REPORT

ON

THE POWERS OF THE ONTARIO FILM REVIEW BOARD

ONTARIO LAW REFORM COMMISSION

1992

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Ontario
Law Reform
Commission

To The Honourable Howard Hampton
Attorney General for Ontario

Dear Attorney:

We have the honour to submit our *Report on the Powers of the Ontario Film Review Board.*

Richard E.B. Simeon
Acting Chair

Earl A. Cherniak
Commissioner

John D. McCamus
Commissioner

Margaret A. Ross
Commissioner

November 12, 1992

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PREFACE

The Commission's *Report on the Powers of the Ontario Film Review Board* centres on the classification and approval powers presently held by the Board. Lisa Brownstone, Counsel at the Commission, was responsible for the preparation of this Report.

An Advisory Board was established by the Commission, composed of individuals from various disciplines and organizations. The Commission would like to express its deep appreciation to the members of the Board: Audrey Cole, Film Policy Advisor, Ministry of Culture and Communications; Rose Dyson, Canadians Concerned About Violence in Entertainment; Catherine Gilbert, Canadian Civil Liberties Association; Paul Gratton, CEO, Ontario Film Development Corporation; Janet Greene-Potomski, Executive Director, Windsor Women's Incentive Centre; Patricia Herdman, Toronto Women in Film and Television; Meg Hogarth, Executive Director, National Watch on Images of Women in the Media Inc. ("MediaWatch"); Gwen Landolt, National Vice-President, R.E.A.L. Women of Canada; Catherine MacLean, Special Assistant—Policy, Office of the Minister, Ministry of Consumer and Commercial Relations; Wendy Gross, Acting Senior Policy Advisor—Justice Unit, Ontario Women's Directorate; Marie Marchand, Chair, Municipal Action Committee on Violence Against Women, North Bay, Ontario; Detective Sergeant Robert Matthews, Officer in charge of Project P, a joint force of the Ontario Provincial Police and the Metropolitan Toronto Police; Professor Thelma McCormack, Director, Centre for Feminist Research, York University; Jeff Moore, Ontario Coalition Against Film and Video Censorship; Kenneth Newberry, Rent a Reel Video Inc., Smiths Falls, Ontario; Susan Oxtoby, Film Officer, Canadian Film Makers Distribution Centre; Robert Payne, Chair, Ontario Film Review Board; Daniel Weinzweig, Chairman, Cinephile. In addition, the Commission advertised for submissions. The Commission would like to thank the organizations and individuals who responded to the issues discussed in the advertisements.

Finally, the Commission would like to thank Jocelyn Kapusta, a student at the Commission, for her assistance, as well as Cora Calixterio, a secretary at the Commission, and Doreen Potter, the copy editor, for their work on the manuscript.

INTRODUCTION

The current mandate of the Ontario Film Review Board gives it broad powers over the classification, prohibition, and regulation of the exhibition and distribution of films and videos in Ontario. Films and videos are treated under a separate regime owing in part to the mimetic power of these media.[1] A rapid expansion in technology has resulted in a vast increase in accessibility to Canadians of moving images in various forms. The impact of films, videos, and other similar, newer technologies remains a subject of some uncertainty and controversy, and the object of many social science studies.[2] Legal regulation of these media is often in the position of having to catch up both to technological advances and to societal reaction to those advances.

These changes in technology and accessibility, coupled with renewed vociferous debates about censorship and related issues, demonstrate the tension between the value of freedom of expression, on one hand, and the concern about potential harms from sexually violent, degrading, or dehumanizing depictions contained in these media, on the other hand. This tension renders a review of the powers of the Ontario Film Review Board timely. The aim of this Report is to determine whether the Board's powers of classification and approval permit it to fulfil effectively the purposes for which it was intended.

As is outlined more fully in chapter 1 of this Report, the Board's powers are separated from those of the Director, who is appointed to administer and enforce the *Theatres Act* and the regulations.[3] This Report concerns itself with the activities of the Board, not the Director, and does not deal with issues such as the powers of inspectors,[4] decisions and conditions concerning the licensing of theatres,[5] and other powers that fall within the purview of the Director.

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1 See, for example, M. McLuhan, *Understanding Media*[:] *The Extensions of Man* (New York: McGraw-Hill, 1964), at 231, 284 *et seq.* See, also, D. Lacombe, *Ideology and Public Policy*[:] *The Case Against Pornography* (Toronto: Garamond Press, 1988), at 51, and M. Dean, *Censored! Only in Canada* (Toronto: Virgo Press, 1981), at 3-5 and 13-15.

2 See *infra*, ch. 2, sec. 2(a)(ii)a.

3 *Theatres Act*, R.S.O. 1990, c. T.6, ss. 2(1) and 3(2), (6) and (7). See Regulation under the *Theatres Act*, O. Reg. 487/88.

4 *Theatres Act*, *supra*, note 3, s. 4.

5 *Ibid.*, ss. 9, 11-17.

In chapter 1 of the Report the Commission gives a brief history of the Board and highlights the changing concerns the Board has dealt with over the course of its existence. We then examine the current powers and composition of the Board in enough detail to provide a framework for the discussion that follows. The chapter concludes with a look at the systems in place in Manitoba and the United States, in so far as they differ in fundamental structural ways from the current Ontario system. This provides further background information that will assist in situating and analyzing the remainder of the issues raised in the Report.

Chapter 1 points out that the greatest concern in the eyes of the current Board is sexually violent, degrading, and dehumanizing material. This reflects the change in the material with which the Board is confronted, as well as evolving community standards. Chapter 2 therefore goes on to discuss the issue of pornography and to review some of the other methods that exist or have been proposed for the regulation of pornography.

Chapter 3 of the Report considers the various public law issues raised in the context of the Film Review Board. Relevant constitutional issues require both a division of powers analysis and a consideration of the *Canadian Charter of Rights and Freedoms*.[6] Because the Board operates as a Schedule I agency,[7] an analysis of administrative law issues is also undertaken. The potential for judicial review of the Board's decisions and the adequacy of its procedures given the standards of fairness required by this body of law are analyzed. Further, the overlap between the *Charter* and administrative law, including the applicability of the *Charter* to the Board's decisions, is discussed in this chapter.

The Commission returns to a more in-depth look at the practical use of the Board's powers in chapter 4. These powers are discussed in the context of the preceding issues, and are evaluated to determine whether they serve their intended functions or whether they require revision in order to be able to do so.

The Report concludes with a summary of the Commission's recommendations.

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[6] Being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.) (hereinafter referred to as the "*Charter*").

[7] See Ontario, Management Board of Cabinet, *Directives*, Directive 6-2, Establishing and Scheduling of Absences, at 6-2-6 (Appendix - Ontario Agencies).

CHAPTER 1

SNAPSHOT OF THE ONTARIO FILM REVIEW BOARD

1. BRIEF HISTORY OF THE ONTARIO FILM REVIEW BOARD

On March 24, 1911, the Ontario Legislature passed one of the first statutes in Canada to provide for film censorship.[1] *The Theatres and Cinematographs Act*[2] created a Board of Censors consisting of three people, who were to hold office during pleasure.[3] The Board was formed "under the chairmanship of George G. Armstrong answering to the Provincial Treasurer".[4]

At the outset, the Board possessed extensive powers. The legislation granted the Board the "power to permit the exhibition or absolutely to prohibit or reject all films which it is proposed to use in the Province of Ontario and to suspend for cause the license of any operator".[5]

The Act provided for an appeal "to the person, body or Court designated and subject to the conditions prescribed by regulation of the Lieutenant-Governor in Council".[6]

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1 Other provinces were also beginning to establish boards around this time. See M. Dean, *Censored! Only in Canada* (Toronto: Virgo Press, 1981), at 20, 165, and L.C. Larry and H.J. Kirsh, "The Men with the Scissors", Part 1 (1971), 19 Chitty's L.J. 73, at 76.

2 1 Geo. V, c. 73 (Ont.).

3 *Ibid.*, s. 4(1).

4 Ontario Film Review Board, *History of the Theatres Branch—Ontario* (undated memorandum), at 1 (hereinafter referred to as "*History*"). The Board has answered to various Ministers during its existence, including the Premier, the Minister of Tourism and Information, and the Minister of Consumer and Commercial Relations.

5 *Supra*, note 2, s. 4(1). The Board of Censors' licensing power provided an effective mechanism to achieve compliance with the Board's regulations. Dean notes that in addition to the projectionist, "[t]he theatre owner and distributor were also licensed by the censor board, so that legal pressure existed at all stages of the distribution and exhibition chain to conform with the standards and edicts handed out by the censors": *supra*, note 1, at 20.

6 *Supra*, note 2, s. 4(2). Dean states that, "[t]he provincial censors had the effective power to ban any film for any reason, and since appeals were not made to the courts, but to political authorities, the temptation for political meddling was obvious": *supra*, note 1,

Early Canadian censors rejected scenes of seduction, infidelity, and American flag waving;[7] by 1926, "[j]uvenile delinquency, anti-social behaviour, and media effects were to emerge as the new rationale of censorship".[8]

During the 1940s, "propaganda films" were a primary concern of the Ontario Board of Censors and while "[p]ictures of riots and strikes were '...cut out of any newsreel...'", films that were labelled "Communist propaganda" were banned outright.[9] The Board was also concerned about horror, kissing, dancing, and religious propaganda. Standards became even more restrictive when, at the outbreak of the Second World War, "all foreign films except those from France were banned".[10]

Along with the political influences noted above,[11] the policies of the Board of Censors were also shaped and influenced by external social forces. In 1919, criticism received by the Board from both the press and women's groups for its reluctance to appoint women on a permanent basis resulted in the appointment of a woman within the year.[12]

Over the years the Board of Censors has had repeated swings towards and away from the application of formalized censorship standards. In 1918, the original censorship regulations were repealed[13] and the Board was given

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at 57. He goes on to recount instances that demonstrate the blatantly political influences on the Board of Censors' powers. As well, the appeal committee was established in 1918 and was composed of the Minister, his secretary, and one appointee. In 1928, the appeals laws provided that an appeal could be lodged with the Lieutenant Governor in Council, who would name an appeal board to review the film. In practice, however, the original decision was rarely undermined: Larry and Kirsh, *supra*, note 1, at 76. By 1972, "[a]ppeals from a decision of the Director or Assistant Director on matters other than censorship were removed from the Theatres Branch and subjected to judicial process": *History*, *supra*, note 4, at 4; Dean criticizes this procedure: *supra*, note 1, at 147. Finally, during the 1980s, Board Chair Mary Brown instituted "an appeal procedure for exhibitors who were dissatisfied with Board decisions": S.G. Cole, *Pornography and the Sex Crisis* (Toronto: Amanita Enterprises, 1989), at 90. The current appeal procedures are described *infra*, text accompanying notes 55-59.

7 Dean, *supra*, note 1, at 21. Thus the Boards were described as "guardians of nationalism as well as guardians of public morality": *ibid.* By 1921, the *Standards and Field of Work of the Ontario Board of Censors of Moving Pictures* (March 1, 1921), at 4, provided: "The Board will use judgment in eliminating unwarranted display of foreign flags, and will also call for a respectful presentation of all British flags."

8 Dean, *supra*, note 1, at 32.

9 *Ibid.*, at 34-35.

10 *Ibid.*, at 35.

11 See *supra*, note 6.

12 *History*, *supra*, note 4, at 2, and Dean, *supra*, note 1, at 136-37.

13 Dean, *ibid.*, at 135.

"a completely free hand to permit or refuse any film".[14] This continued until 1921 when the Board adopted a set of standards that were listed in a booklet entitled *Standards and Field of Work of the Ontario Board of Censors of Moving Pictures*.[15] Dean describes the provisions contained in the booklet as follows:[16]

> The board promised 'to save all pictures possible,' by making its judgment 'from the standpoint of a normal Ontario audience,' therefore excluding degrading, immoral, improperly suggestive, harmful, and indecent films. Movies were not allowed to 'show a successful balking of the law,' albeit 'the showing of certain good-natured comedies dealing with officials may not be regarded as attacks on law and order.' There were also provisions against the display of foreign flags, cruelty to animals, firearms, violence, crime, arson, insanity, murder, and suicide.

Once again in 1936, there was a movement away from the formalized standards that were set out in 1921. Under the chairmanship of O.J. Silverthorne, the Board of Censors "moved away from the official 1921 censorship standards, believing that each film should be judged on its own merits".[17] It also began to classify films,[18] thereby becoming "the first [censor board] in North America to introduce a true system of classification".[19] The classification system evolved over time, and in 1981 it was changed to comprise the four categories that exist today: Family; Parental Guidance; Adult Accompaniment; and Restricted.[20]

Dean credits Silverthorne's progressive "philosophy of censorship" as the attribute that permitted the Chair "to keep pace with the times over the next four decades and to give Ontario the most liberal censorship in Canada during his tenure".[21] It was at this time that the Ontario Board of Censors developed "such censorial inventions as legal age-restricted film classification and a special symbol to designate restricted films".[22] During his tenure, the

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14 *History*, *supra*, note 4, at 1.

15 *Supra*, note 7. See Dean, *supra*, note 1, at 137.

16 Dean, *ibid.*, at 137.

17 *Ibid.*, at 139.

18 *History*, *supra*, note 4, at 3.

19 Larry and Kirsh, *supra*, note 1, at 76-77.

20 *History*, *supra*, note 4, at 4. The current system is described in more detail *infra*, ch. 4, sec. 1(a).

21 Dean, *supra*, note 1, at 139.

22 *Ibid.*, at 135.

number of rejected films dropped dramatically[23] and the Board "enjoyed a reputation as the most liberal and enlightened of Canadian censor boards".[24] Silverthorne is quoted as having said that "[b]anning any film today only arouses controversy and brings it a publicity value it does not deserve".[25] Silverthorne was a long-serving Chair, whose term ran from his appointment in 1934 to his retirement in 1974.

Major changes to the operations of the Ontario Board of Censors were made beginning in 1980 when Mary Brown was appointed its Chair.[26] She "quickly set about reforming the board's image and policies".[27] The changes during Brown's tenure included changes to the classification system,[28] replacement of the full-time civil servant Board membership with a rotating Board of private citizens,[29] and "[a]s a gesture of openness, [provision of] information about eliminations...to the public upon request".[30] The period during which Brown served as Chair was a controversial one; the Board at this time was highly interventionist and willing to prohibit the exhibition of films or parts of films on a wide variety of bases.[31]

As noted in chapter 3 of this Report, following the Ontario Court of Appeal's decision in *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors*,[32] the Government of Ontario quickly responded by introducing Bill-82.[33] That Bill more clearly defined the role of the Board and provided for detailed regulations to be passed, prescribing criteria upon

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23 *Ibid.*, at 139. See, also, H.J. Kirsh, "Film Censorship: The Ontario Experience" (1970-71), 4 Ottawa L. Rev. 312, at 313.

24 Dean, *supra*, note 1, at 72.

25 *Ibid.*, at 141.

26 Ms. Brown's tenure lasted until 1986.

27 Dean, *supra*, note 1, at 152.

28 See text corresponding to note 20, *supra*.

29 *History*, *supra*, note 4, at 4, and Dean, *supra*, note 1, at 154. Although the rotating membership was intended to permit the Board "to keep in touch with public mores" and to provide "censorship by 'community standards'", the first appointees came from within the film industry itself: *ibid.*, at 154-55. See, also, *infra*, this ch., sec. 3.

30 Dean, *ibid.*, at 152. Brown explained the policy behind making eliminations in the following statement: "When we make cuts we never make it on the basis of ideas, always on pictorial images that impact on an audience in the way that incites anti-social behaviours": D. Lacombe, *Ideology and Public Policy*[:] *The Case Against Pornography* (Toronto: Garamond Press, 1988), at 55.

31 For details, see, for example, Lacombe, *ibid.*, at 51 *et seq.*

32 (1984), 45 O.R. (2d) 80, 5 D.L.R. (4th) 766 (C.A.); leave to appeal to S.C.C. granted (1984), 3 O.A.C. 318 (S.C.C.). For a discussion of this case, see *infra*, ch. 3, sec. 2(b)(i).

33 *An Act to amend the Theatres Act*, Bill-82, 1984 (now S.O. 1984, c. 56) received Royal Assent on December 14, 1984.

which the Board would act, thereby transforming the Board into "a lawful body whose practices became accountable through the rule of law".[34] The Board thus returned to the practice of applying formalized standards, a method that had been rejected by Silverthorne decades earlier.[35]

In 1984, the amendments to sections 38 and 39 of the *Theatres Act*[36] made it mandatory for all video distributors to submit their videos to the Board for approval.

In 1988 an amendment to the *Theatres Act* formally separated the Ontario Film Review Board from the Theatres Branch Administration, creating an independent Board that reported to the Minister of Consumer and Commercial Relations.[37] New regulations that came into force in August 1988 created exemptions for film festivals, art galleries, and several other specified exhibitions, as long as admission is restricted to adult audiences.[38]

The activities of the Board can thus be seen to be quite heavily influenced by the attitude of the Chair. Enough latitude for the exercise of discretion was given to the Board by its constitutive legislation that successive Boards have had room to fluctuate among degrees of restrictiveness. This remains true today, even though the Board now operates within the confines of the legislative and regulatory parameters described below. As will be outlined in this Report,[39] most of the eliminations required by the current Board are from adult sex videos. This reflects the prevailing concern in contemporary society about the effects of violence, particularly sexual violence, upon attitude and behaviour patterns in our communities. While the Board retains extensive powers of refusal, it currently exercises its discretion almost solely to refuse scenes of sexual violence or degradation.

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34 Lacombe, *supra*, note 30, at 58. The 1984 amendment also expanded the Board's powers to cover the distribution of videos, and changed the Board's name to the Ontario Film Review Board, although it retained the power to require eliminations from films.

35 *Supra*, note 17 and accompanying text.

36 R.S.O. 1980, c. 498, as am. by S.O. 1984, c. 56, s. 15.

37 *Theatres Amendment Act, 1988*, S.O. 1988, c. 8, s. 2.

38 Regulation under the *Theatres Act*, O. Reg. 487/88, ss. 32 and 33. These exemptions are discussed *infra*, ch. 4, sec. 2.

39 See *infra*, ch. 4, sec. 1(b).

2. THE BOARD'S CURRENT POWERS

The Ontario Film Review Board currently operates pursuant to the provisions of the *Theatres Act*[40] and reports to the Minister of Consumer and Commercial Relations.[41] The Board is a Schedule I agency, whose primary function is listed as regulatory.[42] The most recent Memorandum of Understanding between the Minister of Consumer and Commercial Relations and the Ontario Film Review Board states that it is the responsibility of the Chair to undertake "initiatives for on-going consultations with the community to ensure that Board decisions are sensitive to community standards".[43]

The *Theatres Act*[44] includes provisions that regulate safety standards, classification and licensing of movie theatres, film exchanges, and the licensing of projectionists, as well as the classification and approval powers of the Board. "Film" is defined in section 1 as "cinematographic film, videotape and any other medium from which may be produced visual images that may be viewed as moving pictures".[45] The Board's powers are set out in section 3(7) of the Act, which provides as follows:

> 3.—(7) The Board has power,
>
> (a) subject to the regulations, to approve, prohibit and regulate the exhibition and distribution of film in Ontario;
>
> (b) when authorized by the person submitting film for approval, to remove from the film any portion that it does not approve of for exhibition or distribution;

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40 R.S.O. 1990, c. T.6.

41 *Ibid.*, ss. 3(3) and 1.

42 See Ontario, Management Board of Cabinet, *Directives*, Directive 6-2, Establishment and Scheduling of Agencies, at 6-2-6 (Appendix—Ontario Agencies). The implications of being designated a regulatory board are set out *infra*, ch. 3, note 156.

43 Section III.3.(d).

44 *Supra*, note 40. The functions under the Act have been split between a Director and the Chair of the Film Review Board since the 1988 amendments to the Act, *supra*, note 37, s. 2. Until that time, there was one position, that of Director, who also served as Chair of the Board. Under the current system, the Director deals with, *inter alia*, conditions of licences (s. 6(1)); renewals, suspensions, and cancellations thereof (ss. 9, 14); and safety related issues (ss. 18, 20). She receives applications for projectionists' licences (ss. 25, 26); may refuse to renew, cancel, or suspend these (s. 31); and governs film exchange licences (s. 40). This Report is concerned with the statutory functions of the Ontario Film Review Board, now headed by its own Chair, and not with those of the Director.

45 *Theatres Act*, *supra*, note 40, s. 1.

(c) subject to the regulations, to approve, prohibit or regulate advertising in Ontario in connection with any film or the exhibition or distribution thereof;

(d) to classify films in accordance with the classifications set out in subsection (9); and

(e) to carry out its duties under this Act and the regulations.

Sections 3(9) and (10) set out the various classifications that may be accorded to any film, and each classification category's corresponding age requirement. Thus, a film classified as "family" is "one that the Board considers appropriate for viewing by a person of any age";[46] the "parental guidance" classification is to be given to films "that the Board considers every parent should exercise discretion in permitting a child to view";[47] "adult accompaniment" is reserved for films "the Board considers the viewing of which should be restricted to persons fourteen years of age or older or to persons younger than fourteen years of age who are accompanied by an adult";[48] and the "restricted" classification is accorded to films "the Board considers the viewing of which should be restricted to persons eighteen years of age or older".[49]

The Board itself, in keeping with the directive in the regulations that in "exercising its authority under sections 3 and 35 of the Act, the Board shall consider the film in its entirety and take into account the general character and integrity of the film",[50] has issued classification guidelines that indicate the bases for according particular classifications to films. Thus, the guidelines specify criteria in relation to the levels and types of language, violence, nudity, sexual involvement (activity), and subject-matter/treatment that are suitable for each classification. The most recent guidelines have been approved by members of the Board as of June 28, 1990, and state that from time to time guidelines may be set aside at the Board's discretion.[51] The flexibility accorded to the Board by the legislation to determine the

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46 *Ibid.*, s. 3(9) and (10)(a).

47 *Ibid.*, s. 3(9) and (10)(b).

48 *Ibid.*, s. 3(9) and (10)(c).

49 *Ibid.*, s. 3(9) and (10)(d). See s. 19(3), (4), (5), and (6) for provisions governing the enforcement of these classifications.

50 Regulation, *supra*, note 38, s. 14(1).

51 Ontario Film Review Board, Classification Guidelines, June 28, 1990 (hereinafter referred to as "Guidelines"). A more detailed description of these guidelines is set out *infra*, ch. 4, sec. 1(a).

acceptable content for each category allows it to classify in accordance with community standards, which are apt to change over time.[52]

Sections 33 to 39 of the *Theatres Act* deal with the approval of films and advertising by the Board.[53] Most significant among these sections are:

> 33.—(1) Before the exhibition or distribution in Ontario of a film, an application for approval to exhibit or distribute and for classification of the film shall be made to the Board.
>
> (2) After viewing a film, the Board, in accordance with the criteria prescribed by the regulations, may refuse to approve the film for exhibition or distribution in Ontario.
>
> (3) The Board, having regard to the criteria prescribed by the regulations, may make an approval conditional upon the film being exhibited in designated locations and on specified dates only.

The Board generally reviews films in panels of three. When the decision of a panel is not unanimous and the dissenting person feels an injustice was done, that member can approach the Chair who will then get another panel of four to review the film. Thus seven people will have viewed the film and voted on the classification or approval issue. The final decision is then made according to a majority of those seven votes. This process is called a "cumulative vote",[54] and exists in addition to the processes of internal review and appeal provided for in the Act.

Appeals from the Board's decisions concerning classification and approval may be made to a panel of the Board[55] composed of at least five

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52 Conversation with Robert Payne, Chair of the Ontario Film Review Board, June 2, 1992.

53 The term "approval" is used, but it necessarily implies a censorship power over films or portions of films that are not approved. Throughout this Report, the term "approval" should be read as including censorship of films or parts of films. Many people have pointed out another confusing result of the terminology of "approval". Once a film passes through the Board, the Board puts a sticker on it that reads: "This is to certify that the reel of film numbered in the margin has been approved by the Board under the *Theatres Act* and Regulations": conversation with secretary of Ontario Film Review Board. There is some concern that this implies that the film is approved for distribution in Ontario and cannot later form the basis for prosecution for obscenity under federal criminal law. This is not the case, as will be discussed *infra*, ch. 3, sec. 2(c). To the extent that confusion is engendered, the language of "approval" is regrettable.

54 Conversation with Robert Payne, *supra*, note 52.

55 *Theatres Act*, *supra*, note 40, s. 33(5).

members.[56] Decisions by the panel concerning classification are final;[57] those concerning approval may be appealed to the Divisional Court on questions of law or fact or both, and the Court may direct the Board to take any action the Court deems proper.[58] Films may be submitted for reconsideration by the Board where the Chair of the Board is of the opinion that the criteria have changed since the film was submitted for classification or approval.[59]

Section 37 provides:

> 37.—(1) No person shall exhibit, distribute or offer to distribute or cause to be exhibited, distributed or offered for distribution in Ontario any film that has not been approved by the Board.
>
> (2) No person shall exhibit or cause to be exhibited in Ontario any film that has been approved by the Board subject to any conditions except in accordance with those conditions.

Films must be exhibited or distributed in the state in which they were approved by the Board; it is against the provisions of the Act to alter approved films or cause them to be altered.[60] Section 39 governs the approval of advertising for films.

Important too are the provisions of the Act that create offences; most significant is section 58, which provides:[61]

> 58.—(1) Every person who,
>
> (a) knowingly furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the regulations;
>
> (b) knowingly fails to comply with any order, direction or other requirement made under this Act; or

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56 *Ibid.*, s. 33(7).

57 *Ibid.*, s. 33(6). However, these decisions may always be open to judicial review. See the discussion *infra*, ch. 3, sec. 4(a).

58 *Theatres Act*, *supra*, note 40, s. 33(8) and (9).

59 *Ibid.*, s. 34.

60 *Ibid.*, s. 38.

61 To aid in enforcement, inspectors are given powers under the Act, *ibid.*, to enter premises where films are exhibited (s. 4(2)(e)) and to direct that a projector, film, or advertising be turned over to the inspector where an inspector believes the projector was operated or the film or advertising was exhibited, used, or offered for distribution contrary to the Act or regulations (s. 4(3)).

(c) contravenes this Act or the regulations,

and every director or officer of a corporation who knowingly concurs in such furnishing, failure or contravention is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than one year, or to both.

(2) Where a corporation is convicted of an offence under subsection (1), the maximum penalty that may be imposed upon the corporation is $100,000 and not as provided therein.

Further, section 44(a) provides:

44. The Director may, after a hearing, refuse to renew or suspend or cancel any film exchange licence if,

(a) the licensee has contravened this Act or the regulations and the licensee's conduct raises a reasonable doubt as to whether the licensee will comply with this Act and the regulations in carrying on the business of a film exchange; or

Finally, section 60 gives the Lieutenant Governor in Council the power to make regulations concerning many facets of film exhibition and distribution including, to name but a few, the equipment to be used, proper storage arrangements, operation of projection equipment, and terms and conditions of licences. Of direct importance to the Board's powers of classification and approval are the following provisions:

60.—(1) The Lieutenant Governor in Council may make regulations,

. . . .

9. prohibiting and regulating the use, distribution or exhibition of film or any type or class thereof;

10. prohibiting and regulating the use and display of any advertising matter in connection with any film or the exhibition thereof;

. . . .

33. exempting any theatre, film exchange, projector, film or person or any class or type thereof from any provision of this Act or the regulations;[62]

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62 Sections 28 and 29 of the regulation, *supra*, note 38, contain relevant exemptions; these are discussed more fully *infra*, ch. 4, sec. 2.

34. prescribing criteria on which the Board may exercise its powers under sections 3, 33 and 39 including prescribing the film or advertising content or subject-matter that the Board may refuse to approve;

. . . .

Regulations have in fact been made pursuant to these provisions.[63] They set out the criteria that the Board should take into account in deciding whether to approve a film. The central provision is section 14, which states:

> 14.—(1) In exercising its authority under sections 3 and 35 [now s. 33] of the Act, the Board shall consider the film in its entirety and take into account the general character and integrity of the film.
>
> (2) After viewing a film, the Board may refuse to approve a film for exhibition or distribution in Ontario where the film contains,
>
> (a) a graphic or prolonged scene of violence, torture, crime, cruelty, horror or human degradation;
>
> (b) the depiction of the physical abuse or humiliation of human beings for purposes of sexual gratification or as pleasing to the victim;
>
> (c) a scene where a person who is or is intended to represent a person under the age of sixteen years appears,
>
> (i) nude or partially nude in a sexually suggestive context, or
>
> (ii) in a scene of explicit sexual activity.
>
> (d) the explicit and gratuitous depiction of urination, defecation or vomiting;
>
> (e) the explicit depiction of sexual activity;
>
> (f) a scene depicting indignities to the human body in an explicit manner;
>
> (g) a scene where there is undue emphasis on human genital organs; or
>
> (h) a scene where an animal has been abused in the making of the film.

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63 See Regulation, *supra*, note 38.

> (3) In this section, "sexual activity" means acts, whether real or simulated, of intercourse or masturbation and includes the depiction of genital, anal or oral-genital connection between human beings or human beings and animals and anal or genital connection between human beings by means of objects.

In addition, the Board may assign "information pieces" to films. These are designed to give viewers an idea about the contents of the film. There are currently seventeen such pieces; they include "Brutal Violence", "Frightening Scenes", "Nudity", and "Not Recommended for Children".[64] The pieces, if issued by the Board, must accompany advertisements of films.[65]

Further, it is important to note that section 14(2) of the regulations, set out above, confers a discretionary power; it states that "the Board *may* refuse to approve a film". Thus, the issue of the proper exercise of discretion in terms of both administrative and constitutional concerns arises, and is discussed below.[66]

3. COMPOSITION OF THE BOARD

The legislation stipulates that the Board "shall consist of a chair of the Board and such other persons as the Lieutenant Governor in Council may appoint".[67] The Lieutenant Governor in Council is also empowered to "designate one member of the Board as chair and one or more members of the Board as a vice-chair".[68]

The Board currently[69] consists of one Chair, four Vice-Chairs and seventeen other members. Since 1981, the Board has been composed of a rotating group of private citizens, replacing the previous composition of civil servants.[70] The Board's membership now represents a cross-section of the population of Ontario, including representatives from various ethnic communities and geographic areas in the province. Members represent a broad group of occupations, including actors, teachers, journalists, models, lawyers, and writers. As well, there are representatives of women's groups

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64 Guidelines, *supra*, note 51.

65 Ontario Film Review Board, *Classification System* (leaflet); Regulation, *supra*, note 38, s. 12.

66 See *infra*, ch. 3, secs. 4 and 5.

67 *Theatres Act*, *supra*, note 40, s. 3(1).

68 *Ibid.*, s. 3(2).

69 As of June 1992. Board membership is currently changing, as some members' terms are expiring and replacements are to be appointed.

70 *History*, *supra*, note 4, at 4.

and a gay and lesbian organization. This kind of membership has been specifically cultivated; the Board was, at one time, composed mainly of people from within the industry.

The Commission endorses the practice of appointing Board members who represent a broad cross-section of society, thus providing the Board with access to the diverse components of "community standards".

4. SALIENT ASPECTS OF OTHER ARRANGEMENTS

Seven of the ten Canadian provinces have film boards loosely comparable to the Ontario Board; the Nova Scotia Board acts for New Brunswick, Prince Edward Island, and Newfoundland.[71] The boards all differ in certain respects, and the differences will be discussed as the relevant topics are raised throughout this Report. This section will deal only with fundamental structural differences. The most significant jurisdictions for these purposes are Manitoba and the United States.

(a) MANITOBA

The most distinctive characteristic of the Manitoba system is that the Manitoba Film Classification Board no longer has the power to require eliminations from films or to prohibit them from being viewed entirely. This change was instituted by the amendments to *The Amusements Act*[72] in 1972. Prior to 1972, Manitoba's Censor Board had the power to "permit or prohibit the exhibition of any film or slide";[73] they had the *discretion* to do so if films or slides depicted[74]

> scenes of an immoral or obscene nature, or which indicate or suggest lewdness or indecency, or marital infidelity, or showing the details of murder, robbery, or criminal assault, or depicting criminals as heroic characters; and the censor board *shall* refuse to approve any other picture that it may consider injurious to public morals, suggestive of evil to the minds of children or against the public welfare.

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71 The details of this are set out *infra*, ch. 3, sec. 2(a)(iii).

72 R.S.M. 1970, c. A70, as am. by S.M. 1972, c. 74.

73 *Ibid.*, s. 22(3).

74 *Ibid.*, s. 23(2) (emphasis added).

Portions of films could likewise be eliminated.[75] These and other powers were outlined in Part III of the 1970 legislation, under the title "Censorship of Moving Pictures". Appeals were to lie from the Censor Board to an appeal board appointed by the Minister.[76] The decision of the majority of that board was final.[77] The classification of films was governed by the regulations.[78]

In 1972, Part III of the Act was replaced by a new Part III entitled "Classification of Moving Pictures".[79] No censorship or approval powers have been contained in the Act since this time. Section 22(3) of the amended Act[80] granted the Board the power to classify all slides and films prior to their exhibition, and to control and regulate the advertising relating to these films and slides. Again, the appeal provision permitted appeals to a board appointed by the Minister.[81] It was explicitly stated in this legislation that:[82]

> 23.—(2) The board shall
>
> (a) classify any film or slide which in its opinion is unsuitable for viewing by children or by a family by reason of sex, nudity, violence, foul language or other reason, in such a manner that the film or slide shall be restricted to viewing only by persons eighteen years of age and over.

Some members of the Legislative Assembly were against this inclusion in the new legislation, as previously there had been no such category and children under eighteen had been permitted to attend if accompanied by an adult.[83]

The current legislation[84] continues to provide for a classification, and not a censorship, board. Appeals of decisions concerning matters other than classification may be made to the Court of Queen's Bench on certain

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75 *Ibid.*, s. 26(3).

76 *Ibid.*, s. 22(5).

77 *Ibid.*, s. 26(6).

78 *Ibid.*, s. 35(1)(g).

79 *An Act to Amend the Amusements Act (2)*, S.M. 1972, c. 74, s. 4.

80 *The Amusements Act*, *supra*, note 72, as am. by S.M. 1972, c. 74, s. 4.

81 *Ibid.*, s. 22(5), as am. by S.M. 1972, c. 74, s. 4.

82 *Ibid.*, s. 23(2), as am. by S.M. 1972, c. 74, s. 4.

83 See *infra*, ch. 4, note 3.

84 *The Amusements Act*, R.S.M. 1987, c. A70 (also CCSM, c. A70).

grounds.[85] Appeals of classification decisions continue to be made to a board appointed by the Minister.[86]

This is the only jurisdiction in Canada that has formally abolished the power of the Board to censor films.[87] It may be argued that a similar move by Ontario would have a greater impact, because, as is noted elsewhere in this Report, the decisions made by the Ontario Board appear to have a disproportionately significant influence on what is viewed across the country. That is, "editions of films shown in Saskatchewan, the Atlantic provinces and the Territories usually originate at the Ontario Film Review Board".[88]

However, in the following discussion, it is important to bear in mind that there is one Canadian province that has done away with this power, after heated debate in its Legislature.

(b) The United States

A very different approach operates in the United States, where film classification is carried out by a National Rating Board, run by the Motion Picture Association of America (MPAA). In theory, submission to the Board for rating is voluntary; however, many theatres are reluctant to carry unrated films and the films' consequent ability to bring in revenue is adversely affected.[89]

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85 *Ibid.*, s. 39(1).

86 *Ibid.*, s. 41(1).

87 Cole, *supra*, note 6, at 88.

88 *Ibid.*, at 89. See, also, L. King, "Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better?", in V. Burstyn (ed.), *Women Against Censorship* (Vancouver: Douglas & McIntyre, 1985) 79, at 80, and J. Patrick, "Censored", *The Toronto Star* (August 16, 1980), Today Section 7.

89 G. Collins, "Guidance or Censorship? New Debate on Rating Films", *New York Times* (April 9, 1990) C-11.

The system was instituted in 1968, and broke away from an earlier Production Code Administration[90] in which the industry granted approval of films based on content. The new system was designed on the basis that "not all films are appropriate for viewing for all persons", so information should be provided to viewers in advance of their viewing of a film.[91]

The Rating Board is funded from fees charged to producers or distributors for the rating of their films.[92] Board members are chosen based on the following:[93]

> [They] must have a shared parenthood experience, must be possessed of an intelligent maturity, and most of all, have the capacity to put themselves in the role of most American parents so they can view a film and apply a rating that most parents would find suitable and helpful in aiding their decisions about their children's movie going.

The Board votes on a rating, which is decided by majority vote; appeals may be made to the "Rating Appeals Board, which sits as the final arbiter of ratings".[94]

The rating system is composed of five categories: G - "General Audiences – All ages admitted"; PG – "Parental Guidance Suggested; some material may not be suitable for children"; PG-13 – "Parents strongly cautioned. Some material my be inappropriate for children under 13"; R – "Restricted, under 17 requires accompanying parent or adult guardian" (age varies in some jurisdictions); and NC-17 – "No children under 17 admitted" (again, age varies in some jurisdictions).[95] Films that are not

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90 The Motion Picture Production Code, originally adopted by the industry in 1930, contained lists of "do's" and "don'ts" for film-makers and was associated with Will Hays, who was an early head of the Motion Picture Producers and Distributors Association of America, Inc. By 1927 the Hays office had already come up with "eleven 'Don'ts' and twenty-seven 'Be Carefuls' to movie-makers": M. Schumach, *The Face on the Cutting Room Floor* (New York: Da Capo Press, 1974), at 19, 20, and 35-41. See, also, E. de Grazia and R.K. Newman, *Banned Films*[:] *Movies, Censors and the First Amendment* (New York: R.R. Bowker, 1982), at 30-33. Another early and powerful control on films was the Catholic Legion of Decency; films that were condemned by the Legion "had little chance of turning a profit.": S. Farber, *The Movie Rating Game* (Washington, D.C.: Public Affairs Press, 1972), at 6.

91 B.A. Austin, "G-PG-R-X: The Purpose, Promise and Performance of the Movie Rating System" (1982), 12 J. Arts Management & L. 51, at 53.

92 J. Valenti, *The Voluntary Movie Rating System* (Motion Picture Association of America, Inc., 1991), at 5.

93 *Ibid.*, at 6.

94 *Ibid.*, at 6. The Board is composed of members of industry organizations that govern the rating system: *ibid.*, at 7.

95 *Ibid.*, at 7-9.

submitted cannot carry any of these marks, which are registered trademarks, but they may carry any other designations, as long as they are not "confusingly similar" to those of the MPAA.[96] It is estimated that "about 85% of the theatre owners in the nation subscribe to the rating system"[97] and will not permit those under the age specified in the rating to attend. This enforcement is voluntary for both theatre owners and video retailers. Ratings are marked on the videocassette package and on the tape itself.[98]

The system has been criticized as not providing sufficient information to parents and as having the effect of enhancing the desirability of restricted films for teens.[99] Further, film makers and distributors claim[100]

> that the system is a form of censorship. They say it prevents serious adult films from reaching a wider audience because the advertising and distribution of X-rated movies are severely limited and may affect their subsequent acceptability on cable channels.

The ratings accorded to films affect which theatres will accept them and consequently what audience they will reach. The Rating Board may tell film makers or distributors that a lower rating will be accorded if specific scenes are changed in certain ways; film makers see this as forced censorship.[101]

Americans see the strength of their system to lie in its voluntarism and in its independence from government; these characteristics are thought to protect it from First Amendment challenges. However, as shown above, the voluntarism may be, in fact, rather hollow.

(c) The Industry's Proposal

In Canada, there is currently a move within the industry to institute an industry-run national classification board. This raises several issues. Should the system be run by the industry as opposed to government-designated bodies? Should the system be national in scope? Should it have only classification and not censorship powers? This section of the Report will deal only with the first of these issues; the issue of the scope of the system in

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96 *Ibid.*, at 6.

97 *Ibid.*, at 11.

98 *Ibid.*, at 11.

99 See Austin, *supra*, note 91, at 54-55, 66.

100 Collins, *supra*, note 89, at C-11. Note that, in 1990, the X-rated category was changed to the NC-17 category: Valenti, *supra*, note 92, at 4.

101 Collins, *supra*, note 89.

terms of geography and powers will be discussed later in the Report, separately from the issue of whether the system should be industry-run.

First, a brief look at the industry's proposal is in order. The proposal is, like provincial classification systems, informed by a desire "to offer parents and viewers some advance guidance and information about movies".[102] The Board would classify films and videos, and consider all advertising materials. It would classify all trailers as approved for "all audiences" or "restricted audiences".[103] The latter would be permitted to be shown only along with films having higher classifications. The proposal anticipates that "[m]embers of supporting trade associations will formally agree not to distribute, exhibit, lease or sell film and video material unless and until these materials have been classified by the National Rating Board".[104]

The industry proposes that five categories for classification be used. The first category is "General Audiences",[105] for films to which all ages are admitted. These films would contain no nudity, sex scenes, or drug use. No strong language would be present, although some "snippets of language" might go beyond polite conversation.

The second category is "Discretion by parents".[106] Parents might consider parts of the film unsuitable for children and should make their own decisions about whether their children would be permitted to attend. There might be some profanity and some violence, but nothing so strong as to require adult accompaniment. No drug use and no explicit sex would be included, although brief nudity might appear.

The third category is "14 years of age minimum", which is described as a "sterner advisory to parents to determine for themselves whether certain material is suitable for their younger children".[107] These films might contain drug use and coarser language. Children under fourteen would have to be accompanied by an adult in order to be admitted.

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102 *National Classification*[:] *Discussion Paper and Background Study on Film Classification in Canada*, information for Film and Video National Classification Symposium (Toronto: April 3, 1992) (submitted to Provincial Deputy Ministers responsible for film and video classification) (hereinafter referred to as the "proposal"), at 1. The proposal goes on to say that "[o]ne of the critical assumptions of the system is that it is the responsibility of parents to decide what movies they want their children to see or not to see".

103 *Ibid.*, at 2-3.

104 *Ibid.*, at 2.

105 *Ibid.*, at 7.

106 *Ibid.*, at 7.

107 *Ibid.*, at 8.

The fourth category is "18 years of age minimum" and would be ascribed to films that might include "harsh language, tough violence, nudity within sensual scenes, drug abuse, or other elements".[108] These films would be attended by children under eighteen only if they were accompanied by an adult.

The final category of "18" means that no children under 18 would be admitted. These films might contain "very strong violence, sex, aberrational behaviour, drug abuse, or any other element or combination of elements which, when present, would cause parents and the community in general to want this film to be off-limits for viewing by anyone not of adult age".[109]

The categories do not differ drastically from those currently in use by the various provinces.[110] Considerations other than category delineation will thus be paramount in assessing how the proposal would fit within the Canadian context. During the discussion that follows, it should be borne in mind that a government-sponsored system such as currently exists would probably survive constitutional challenge in this country.[111]

It has been noted above that there has been an intentional move away from having industry-related people making these kinds of decisions in Ontario. While the Board was once composed of members of the industry, there are now deliberate efforts made to ensure that Board composition reflects a broad cross-section of the community that it serves. This approach was strongly desired when instituted, and continues to be endorsed by the community, as is evident in part from the submissions received in the course of this project. The Commission therefore sees no reason to depart from the current system of having a Board that operates as a government-run agency. This will ensure that concerns specific to the industry do not dominate the decisions of the Board; the Board will continue to be composed of representatives of the community and people with expertise in the field. Allowing the government to retain control over the Board's procedures and membership appointments will ensure that the Board, which fulfils an important public function, remains publicly accountable for its work.

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108 *Ibid.*, at 8.

109 *Ibid.*, at 9.

110 See *infra*, ch. 4, sec. 1(a).

111 This is discussed *infra*, ch. 3, sec. 2(b).

5. CONCLUSIONS

This chapter has provided an overview of the history, functions and powers of the Board, as well as its composition, so that the remainder of the Report can be better understood against this background. The functions of the Board will be discussed in more detail in chapter 4, at which point an assessment of these powers will be able to be made. Conclusions as to whether Ontario should adopt a system such as that currently in use in Manitoba, where no censorship powers exist, will also be able to be drawn at that point. The Manitoba system has been mentioned here to assist in constructing the framework within which the remainder of the Report should be viewed.

For the reasons outlined above, the Commission is of the view that the Board should continue as a government-run agency composed of a broad cross-section of the community that it serves. Given the history of Board composition in Ontario and public reaction thereto, current practice in this regard should be maintained. Conclusions regarding national uniformity and the use of censorship powers do not have to be made within the context of an industry-run board, and will be assessed in their own contexts in the remainder of this Report.

CHAPTER 2

THE ISSUE OF PORNOGRAPHY

1. INTRODUCTION

As seen from the preceding chapter, the Board has fulfilled different functions over the course of its history. Through our review of the current legislation and regulations, we have noted that much of the Board's power is granted to it in discretionary terms, and permits it to censor or prohibit many images.[1] Based on the Board's assessment of community standards,[2] its current focus in requiring eliminations is on sexually violent and degrading material.[3] This assessment of community standards is also reflected in the submissions received during the course of this study; the material of greatest concern is "hard core pornography". Many people see a connection between the increase in this material and an increase in sexually violent attitude and behaviour patterns in our communities. Indeed, the legislative debates concerning the 1984 amendments to the Board's powers provided for in the *Theatres Act*[4] show that the prevailing concern among legislators was sexually violent materials.[5] We will therefore focus on a discussion of this material, while bearing in mind that the nature of the material that is the focus of difficult censorship decisions is always changing. The Commission proceeds from the premise that conclusions about the remaining provisions that govern the Board's power to require eliminations can be extrapolated from the examination of the most difficult issue.

In considering the issue of pornography, some decisions must first be made about the language and definitions used in the discussion. Distinctions are often drawn between pornography, obscenity, and erotica. Of concern for our discussion are the first two terms, neither of which has a clear-cut

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[1] See Regulation under the *Theatres Act*, O. Reg. 487/88, s. 14, set out *supra*, ch. 1, sec. 2.

[2] The Board is expected to make its decisions in conformity with community standards. See *supra*, ch. 1, sec. 2.

[3] See *supra*, ch. 1, and *infra*, ch. 4.

[4] *Theatres Act*, R.S.O. 1980, c. 498, as am. by S.O. 1984, c. 56.

[5] Ontario, Legislative Assembly, *Debates*, November 13, 1984, at 4099-4100.

definition. "Obscenity" is the term used in the *Criminal Code* of Canada,[6] and its definition has recently been delineated by the Supreme Court of Canada. In *R. v. Butler*,[7] the Court found that there are three types of material sometimes referred to as constituting the undue exploitation of sex. These are: (1) explicit sex with violence; (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing; and (3) explicit sex without violence that is neither degrading nor dehumanizing.[8] The Court held that the first category will "almost always" constitute the undue exploitation of sex; the second will do so if the risk of harm is substantial; the third will only do so if it employs children in its production.[9] For the purposes of this Report, we use the term "pornography", and refer to "obscenity" only when discussing a specific area of the law or piece of literature in which that term is used. The definition of "pornography" used in this Report captures the kind of material referred to in the first two categories set out in *Butler*, that is, explicit sex accompanied by violence or degrading and dehumanizing treatment. The third category is included only insofar as it uses children in its production.

We now turn to consider the complex issue of pornography.

2. THE PROBLEM OF PORNOGRAPHY

Commissions have been set up in many countries to examine the issue of pornography and what can or should be done about it.[10] An increase in the production and availability of pornographic materials in the last two decades, a shift in their content,[11] and a trend toward defining pornography

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[6] R.S.C. 1985, c. C-46, s. 163.

[7] *R. v. Butler*, [1992] 1 S.C.R. 452, 70 C.C.C. (3d) 129 (subsequent references are to [1992] 1 S.C.R.) (hereinafter referred to as "*Butler*").

[8] *Ibid.*, at 484.

[9] *Ibid.*, at 485.

[10] See United States Commission on Obscenity and Pornography, *The Report of the Commission on Obscenity and Pornography* (Washington, D.C.: 1970); United States, *Attorney General's Commission on Pornography: Final Report* (Washington, D.C.: Department of Justice, 1986) (hereinafter referred to as the "Meese Commission"); Canada, *Pornography and Prostitution in Canada*[:] *Report of the Special Committee on Pornography and Prostitution* (Ottawa: 1985) (hereinafter referred to as the "Fraser Report"); and Great Britain, *Report of the Committee on Obscenity and Film Censorship* (Cmnd. 7772, 1979) (hereinafter referred to as the "Williams Committee").

[11] "Feminist literature analyzing pornography as a form of hate literature began to appear in the early and middle 1970's, about the time that the content of popular men's magazines exhibited a major shift from depictions of nude photos of women to depictions of nude women combined with violent and degrading acts": K.E. Mahoney, "Obscenity and Public Policy: Conflicting Values—Conflicting Statutes" (1985-86), 50 Sask. L.R. 77, at 104. See, also, S. Penrod and D. Linz, "Using Psychological Research on Violent Pornography to

in terms of degradation and dehumanization[12] are important modern developments that must have an impact on how the material is to be treated.

As is evident from even a cursory reading of its monthly eliminations reports,[13] pornographic images, to a greater extent than those of non-sexual violence, have become the focus of the censorship work of the Ontario Film Review Board. While the Board may require the elimination of non-pornographic violent scenes from time to time, these are few in number compared to cuts of pornographic material.

The issue of pornography generates a countless number of sharply divergent views. There are theoretical approaches to the issue based on broad moral[14] or political theories;[15] there are individual, emotive views;[16] and there are views based on divergent empirical studies and factions within diversely based coalitions. These approaches may often be separated into two categories: ideas that address the material itself and ideas that address how the material ought to be regulated. Those who agree on the former may difer

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Inform Legal Change", in N.M. Malamuth and E. Donnerstein (eds.), *Pornography and Sexual Aggression* (Orlando: Academic Press, 1984) 246, at 261-62, who cite other references to this effect as well. See, also, Canada, House of Commons, Standing Committee on Justice and Legal Affairs, *Third Report on Pornography*, Issue No. 18 (March 22, 1978), at 18:3.

[12] See definition in "Customs", *infra*, this ch., sec. 4(e), and the definition given to "obscenity" by Supreme Court of Canada in *Butler*, *supra*, note 7. The origin of the distinction between sexually violent and degrading materials and explicit erotica has been attributed to Shannon J. in *R. v. Wagner* (1985), 36 Alta. L.R. (2d) 301, 43 C.R. (3d) 318 (Q.B.); aff'd (1986), 43 Alta. L.R. (2d) 204, 26 C.C.C. (3d) 242 (C.A.); leave to appeal to S.C.C. refused (1986), 26 C.C.C. (3d) 242*n*, 50 C.R. (3d) 175*n* (S.C.C.). See A. Brannigan, "Obscenity and Social Harm: A Contested Terrain" (1991), 14 Int'l. J.L. & Psychiatry 1, at 6.

[13] See discussion of these "classification lists", *infra*, ch. 4, sec. 1(b).

[14] One example of this is the attitude that pornography is wrong because it "exemplifies and recommends behavior which violates the moral principle to respect persons": A. Garry, "Pornography and Respect for Women" (1978), 4 Soc. Theory & Practice 395, at 406. Legal regulation is permissible within the parameters of legal moralism because "the function of the law is to enforce community morality": J. Bakan, "Pornography, Law and Moral Theory" (1984), 17 Ottawa L. Rev. 1, at 5. See, also, C.F. Beckton, "Obscenity and Censorship Re-examined Under the Charter of Rights" (1983), 13 Man. L.J. 351, at 352 *et seq.*

[15] See, for example, the discussion of the liberal approach to this issue, *infra*.

[16] See Beckton, *supra*, note 14, at 358. These views are no less valid or valuable because they are emotive; the depth of reaction to the material is testimony to both the importance and the complexity of the issues it raises.

widely on the latter.[17] Defining what constitutes pornography is an equally divisive issue.[18]

Most factions agree that there is a difference between material that is simply sexually explicit and that which combines sexual explicitness and violence or degradation.[19] Those who would regulate all kinds of overtly sexual materials are on the margins of the debate and do not generally deal with the difficult issues of line-drawing and of seeking regulation that minimally impairs the guarantee of free expression. Thus, while the conservative strand of the debate, based on a highly moralistic, often religiously-based perception of the issue, continues to be adhered to by some constituencies of our society, an in-depth look at this position does little to further the current debate about how to regulate this material.[20] This is because the conservative moral position does not engage in balancing competing rights and interests but asserts morality as the primary concern that can justify state interference. For this reason, this Report will not consider the moral or religiously-based arguments on this issue.

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[17] Indeed, this separation is a very important one. One criticism of those who oppose pornography is that they adopted "the assumption that the only alternative to censorship is passivity and limitless tolerance": G. Hawkins and F.E. Zimring, *Pornography in a free society* (Cambridge, U.K.: Cambridge University Press, 1988), at 198 (hereinafter referred to as "Hawkins"); see, also, *ibid.*, at 216. For this reason, more recent writing on the subject of pornography has been considering a wider range of possible regulatory methods that do not include censorship.

[18] See, for example, K. Ellis, B. O'Dair and A. Tallmer (eds.), "Introduction", in K. Ellis, B. Jaker, B. O'Dair, N.D. Hunter, and A. Tallmer, *Caught Looking* (Seattle, Wash.: Real Comet Press, 1988) 4 (hereinafter referred to as "Ellis *et al.*").

[19] See Book Note, reviewing Donald Downs, "The New Politics of Pornography" (1989), 91 Colum. L. Rev. 1269, at 1272. The difficulties of drawing definitional lines and interpreting nuances should not be underestimated; see, for example, Hawkins, *supra*, note 17, at 107. L. Groarke, "Pornography, Censorship, and Obscenity Law in Canada" (May 1990), 2 Windsor Rev. of Leg. & Soc. Issues 25, at 33, insists that there be a distinction drawn in the definition of "pornography" between mere depictions of sexual violence or harm and the incitement, advocacy, promotion, or encouragement of the harm. Depictions alone, however graphic, may serve an educational, anti-violence function.

[20] Compare the conclusions of Sopinka J. in *Butler*, *supra*, note 7, at 492-93:

> [T]his particular objective is no longer defensible in view of the *Charter*. To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. D. Dyzenhaus, 'Obscenity and Charter: Autonomy and Equality' (1991), 1 C.R. (4th) 367, at p. 370, refers to this as 'legal moralism', of a majority deciding what values should inform individual lives and then coercively imposing those values on minorities. The prevention of 'dirt for dirt's sake' is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*.

Rather, the Report takes the most representative of the significant voices in the contemporary debate to be those of traditional liberals and of feminists. Neither of these is a unified voice; each contains divisions on almost all issues: definition, harm, and regulation. Thus, a look at these two broad groups will allow us to cover much of the vast spectrum of views on these issues. An additional brief look at emerging literature on gay pornography will be useful, as this literature contains recent critical analyses of both liberal and feminist pornography theory.

(a) The Liberal Approach

Contemporary thought about pornography, in terms of both definition and regulation, began its evolution within the traditional liberal intellectual and political framework of our society. As will be seen, the issues of definition, harm, and regulation are intimately connected. For this reason, we discuss them together, rather than separating them into three discrete categories.

The liberal approach to pornography initially characterizes the issue as one of freedom. It is based on the vision of liberty articulated by John Stuart Mill in which liberty may only be restricted where harm to another occurs.[21] For this reason, much of the literature on pornography focuses on the harm that it engenders[22] and seeks to weigh this against the good of free expression. Deciding how to do this has presented liberals with a formidable task. Harm for liberals is thus conceptually most relevant in formulating the decision of *what* to regulate. The tendency in liberal thought is to consider harm in terms of causation. *Freedom* may justifiably be restricted only where the suppressed material *causes harm*.

For some traditional liberal thinkers, suppression of pornography is a clear example of the "tyranny of the majority" against which Mill warned so strongly, since it is views and not conduct[23] that are being suppressed by the

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[21] J.S. Mill, *On Liberty* (first published in 1859) (London, U.K.: Penguin Classics, 1974), at 68-69. A reflection of this is seen in contemporary *Charter* analysis, in which the restriction to a liberty must be weighed against the harm the restriction seeks to avoid in order to determine whether the limit is a constitutionally permissible one: see *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.) (hereinafter referred to as the "*Charter*"). See, also, Bakan, *supra*, note 14, at 8.

[22] See *infra*, notes 39-51 and accompanying text.

[23] Note that "[i]n the liberal tradition a distinction has always been made between thought and action", for "in a free society we control behavior, not thought, however repugnant the latter might be": T. McCormack, "The Censorship of Pornography: Catharsis or Learning?" (1988), 58 Am. J. of Orthopsychiatry 492, at 494.

will of the majority.[24] The tendency to be against any restriction on the expression of ideas, which differs markedly from the attitude toward conduct, is intimately tied to the liberal conception of harm. Words and ideas do not cause harm[25] in the way that conduct may cause another person physical harm. In the absolutist liberal conception, there is no such thing as a false idea;[26] all ideas must enter the marketplace and compete with one another; the best ideas will come to carry the most weight through this process. There should be no prior restriction on access to this marketplace.[27]

While freedom of expression is of central importance, it is not, by the standards of most liberals, an absolute freedom. Rather, the prominence accorded to freedom of expression in traditional liberal thought is accompanied by consequences in terms of the burden of proof; thus, while "[f]reedom of expression is not absolute...the burden of proof is on those who would abridge it to demonstrate that abridgement is necessary".[28] That it promotes violence is one basis upon which some liberals argue to restrict the dissemination of pornography.[29] Further, as feminist writing has gained prominence, some liberal thought has been modified to see harm in more expansive terms.[30]

(i) Liberal Anti-Censorship

Even with these modifications, a strong opinion remains among many liberal thinkers that censorship is not an appropriate response. One view is that attempts to censor pornographic materials cause more harm than good; they render the materials difficult to access and therefore more desirable. If open access were ensured, the subject would become less important and the

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[24] Groarke, *supra*, note 19, at 31.

[25] An early exception to this was the law of defamation, which views the damage to reputation from words in certain contexts as a legally recognized harm.

[26] Recently reaffirmed by the United States Supreme Court in *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 485 U.S. 46 (1988).

[27] For a discussion of one liberal's own views of some of the limitations of the marketplace, see O.M. Fiss, "Free Speech and Social Structure" (1986), 71 Iowa L. Rev. 1405, and O.M. Fiss, "Why the State" (1987), 100 Harv. L. Rev. 781.

[28] McCormack, *supra*, note 23, at 495.

[29] Groarke, *supra*, note 19, at 29.

[30] See, for example, the decisions of Anderson J.A. in *R. v. Red Hot Video Ltd.* (1985), 18 C.C.C. (3d) 1, 45 C.R. (3d) 36 (B.C.C.A.); leave to appeal to S.C.C. refused, [1985] 2 S.C.R. x, 46 C.R. (3d) xxvn, and Sopinka J. in *Butler*, *supra*, note 7, both of which referred to the threat to gender equality and the negative impact on self-worth and self-acceptance in their discussions of the harms of pornography. Compare the *Report of the Special Committee on Hate Propaganda in Canada* (Ottawa: 1966). See, also, discussion *infra*, this ch., sec. 2(a)(ii)a.

problems associated with pornography would decrease, not increase.[31] One advantage of prohibiting censorship is that it would allow interested communities the opportunity to influence the contents of sexual communication because the material would be kept out in the open.[32] Through availability and public actions and discourse,[33] the *delegitimization*[34] of certain imagery could ultimately occur.

Another reason for the anti-censorship approach is a pragmatic one: "[T]here is no way to totally eliminate access to material meeting the feminists' definition, or to prevent exposure to the sexist opinions it allegedly contains".[35] Some of those who agree that pornography represents a serious societal problem do not agree that government action through law is an effective means of combatting it.[36] These groups worry that "[w]omen's

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[31] See statements of Sid Green, M.L.A., in Manitoba, Legislative Assembly, *Debates and Proceedings*, July 3, 1972, at 3682-87 (debates on Bill 70). See, also, Hawkins, *supra*, note 17, at 200.

[32] Hawkins, *ibid.*, at 202. Compare V. Burstyn, "Introduction[:] Struggling for Our Own Voices: Censorhip and Self-Censorship", in *Issues of Censorship* (Toronto: A Space, 1985) 10, at 11.

[33] See E. Hoffman, "Feminism, Pornography, and Law" (1985), 133 Univ. Pa. L. Rev. 497, at 533.

[34] The goal is thus seen not as sanitizing the world so that it is a place from which such images are forcibly removed, but in achieving a societal norm that rejects or delegitimizes this kind of imagery. Compare the words of one well-known feminist anti-pornography writer: "Suppressing obscenity criminally has enhanced its value, made it more attractive and more expensive a violation to get, therefore more valuable and more sexually exciting. Censoring pornography has not delegitimized it; I want to delegitimize it. What would do that is unclear to me at this time": C.A. MacKinnon, "'More Than Simply a Magazine': Playboy's Money", in *Feminism Unmodified*[:] *Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987) 134, at 140 (hereinafter referred to as "*Feminism Unmodified*").

[35] S. Mize, "A Critique of a Proposal by Radical Feminists to Censor Pornography Because of its Sexist Message" (1988), 6 Otago L. Rev. 589, at 610-11 (footnotes omitted). The assertion is not entirely negative, Mize goes on to assert that "A better (ie more successful) approach is to teach the public that the media has *not* been sanitised of all incorrect or repugnant views, and that they must question everything they see or hear", at 611 (footnotes omitted). Compare the words of P. Chevigny, in the opening statement of "Panel Discussion: Effects of Violent Pornography", in *Colloquium*[:] *Violent Pornography: Degradation of Women Versus Right of Free Speech* (1978-79), 8 N.Y.U. Rev. L. & Soc. Change 225, at 233 (hereinafter referred to as "Panel Discussion: Effects"): "If you are an oppressed class in society, the last thing you want are laws controlling speech.... To think that laws which control speech would not be used first against the [oppressed class] is absurd!"

[36] See A. Levine in "Panel Discussion: Regulation of Pornography" (1978-79), 8 N.Y.U. Rev. L. & Soc. Change 281, at 287: "I think the law is rather helpless here. That does not mean we are helpless in the face of this serious social problem.... I think the hope comes through private action." See, also, L. King, "Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better?" in V. Burstyn (ed.), *Women Against Censorship* (Vancouver: Douglas & McIntyre, 1985) 79 (hereinafter referred to as "*Women Against Censorship*"). June Callwood also agrees that there is harm from pornography but disagrees that censorship is the answer: "None of us believes that hard-core pornography is harmless.

attention has been diverted from the causes to the depictions of their oppression"[37] in the intensive focus on pornography.

Thus, the classic liberal approach opposes almost all forms of censorship; government regulation is only to be invoked when serious harm is the direct result of expression. Freedom of expression is such an important value that it should be preserved even if the perceived cost is high. Since expression is of ideas, not conduct, the harm is almost never great enough and the cost almost always too high to justify government intervention or suppression. Solutions should be found by increased expression of opposing views within the marketplace of ideas. A subsidiary view is that attempts to limit expression are often ineffective and may result in perverse effects.

(ii) A Modified Liberal Position

However, there is another strand of liberalism that is less hostile to the possibility of government regulation and sees harm in more expansive terms. As will be seen in chapter 3 of this Report, the Supreme Court of Canada has recently adopted such a position in the *Butler* and *Keegstra* cases.[38] In proceeding this way, the Court has sanctioned a particular approach to the causation issue. For this reason, causation will be discussed at this point in this Report. It is, however, important to note that liberals who have an anti-censorship orientation also rely on the issue of causation to support their anti-censorship position.

a. Causation

Crucial to this modified liberal position is the issue of causation. In order to justify limits on expression, it must be demonstrated that there is a causal link between pornographic materials and harm. It is evident from the introductory remarks to this issue that causation is an unresolved problem in

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We all see it as a gross dehumanization of women, and we all know that whenever one group in society—in this case, men—convinces itself that another group is a subspecies, it becomes permissible to inflict suffering and humiliation on the inferiors": J. Callwood, "Feminist Debates and Civil Liberties" in *Women Against Censorship*, *ibid.*, 121, at 122.

[37] V. Burstyn, "Political Precedents and Moral Crusades: Women, Sex and the State", in *Women Against Censorship*, *ibid.*, 4, at 26. See, also, *ibid.*, at 27. Compare L. Duggan, N. Hunter, and C.S. Vance, "False Promises: Feminist Antipornography Legislation in the U.S.", in *Women Against Censorship*, *ibid.*, 130, at 147.

[38] *Butler*, *supra*, note 7; and *R. v. Keegstra*, [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1 (subsequent references are to [1990] 3 S.C.R.).

pornography debates. One important issue to canvass at the beginning of the discussion is the harm that pornographic material is said to cause.

Many types of harm have been set out in the literature. Lahey has broken down the negative effects into the following: attitudinal harms, in which people are taught to think certain detrimental things about women, such as the theory that violence does not hurt; impairment of self-regard, in which women fear or experience such things as violence or abuse, decreased credibility, and unequal protection of the law; and pornographic abuse, in which women are subject to sexual violence and abuse.[39] The harms have also been described in this way:[40]

> [P]ornography alters and distorts people's notions of sexuality. It alters our notions of consent and nonconsent to sexual activity.... It makes dominance over women and violence against women sexy and sexually fulfilling.... Some materials also serve as 'how-to' guides. For example, there are bondage magazines that describe how to make escape-proof knots....
>
> A second harm of pornography is the injury suffered by those involved in its production...
>
> A third harm of pornography is that it alters men's attitudes and behavior toward women.... [It] also affects the way men act towards women....
>
> These three harms of pornography are exacerbated by the social condition of women. The existence of pornography does not merely inject an element of unfairness into an otherwise fair society. Rather, it tramples on the rights of a discrete class of people who already occupy a subordinate social status. Pornography fuels this inequality.

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[39] K.A. Lahey, "Pornography and Harm—Learning to Listen to Women" (1991), 14 Int'l. L.J. & Psychiatry 117, at 129. Compare Hoffman, *supra*, note 33, at 498, 515-16, 519. See, also, A. Dworkin, "Against the Male Flood: Censorship, Pornography, and Equality" (1985), 8 Harv. Women's L.J. 1, at 9-11.

[40] M.A. Gershel, "Evaluating a Proposed Civil Rights Approach to Pornography: Legal Analysis as if Women Mattered" (1985), 11 Wm. Mitchell L. Rev. 41, at 55-59 (footnotes omitted). Other sexuality related harms are pointed out by D. Zillmann and J. Bryant, "Pornography, Sexual Callousness, and the Trivialization of Rape" in M.S. Kimmel (ed.), *Men Confront Pornography* (New York: Meridian, 1990) 207, at 209 (footnotes and references omitted): "Men, inspired by pornography, may well feel cheated and accuse perfectly sensitive women of frigidity. Lacking corrective information, women might actually come to doubt their own sexual sensitivities. Regarding untried activities, pornography again projects euphoria where it might not exist—at least, not for many. That pornography thus entices actions, and that the resultant experimentation leads to less than satisfactory results, can hardly be doubted.... [W]omen take the brunt of this type of pornography-inspired experimentation.... Requests tended to be backed by brute force ...". At 215-16, they point out that in our society sexuality is a secret, private issue, so that there is not much corrective information publicly available. This is especially problematic because portrayals in pornographic materials often set themselves out in a purely factual manner.

Others have noted the increased acceptance of rape myths among those exposed to pornography, increased acceptance of violence against women, rape fantasies and desensitization to sexual violence.[41] Many harms were brought to light in the public hearings on the Minneapolis ordinance.[42] Broad societal harms are also said to result.[43]

One of the broad harms on which feminist theory focuses is the enormous role played by pornography in the social construction of women's identity:[44]

> Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be.

Thus it has been asserted that "[p]hysical and psychological violence towards women is the norm in our culture".[45] Anti-regulation feminists do not disagree with the assertion that norms in our culture are distorted,[46] but with the conclusion to be drawn from it.

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[41] See K.E. Mahoney, "Obscenity, Morals and the Law: A Feminist Critique" (1984), 17 Ottawa L. Rev. 33, at 52. See, also, the harms referred to throughout, "Panel Discussion: Effects", *supra*, note 35, at 225-45. See, also, D. Linz, S.D. Penrod, and E. Donnerstein, "The Attorney General's Commission on Pornography: The Gaps Between 'Findings' and Facts" (1987), 4 A.B. Foundation Research J. 713, at 719.

[42] See *Pornography and Sexual Violence, Evidence of the Links* (London: Every woman, 1988), at 15 (hereinafter referred to as "*Public Hearings on Minneapolis Ordinance*"). See, also, P. Brest and A. Vandenberg, "Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis" (1987), 39 Stanford L. Rev. 607, at 624: "But the case for the ordinance was based more on the personal experiences of victims than on social science data. A recurring theme throughout the hearings was that aggressors—strangers, friends, husbands—had forced women to submit to degrading and painful scenarios taken from pornographic films and magazines. Many of the witnesses spoke not only of physical injuries, but of lasting shame and degradation. Many had never previously divulged their experiences to anyone but counselors and therapists". The ordinance itself is discussed *infra*, note 154.

[43] Mahoney, *supra*, note 41, at 54.

[44] C.A. MacKinnon, "Not a Moral Issue", in *Feminism Unmodified*, *supra*, note 34, 146, at 148. She goes on to note, at 154-55: "If pornography is an act of male supremacy, its harm is the harm of male supremacy made difficult to see because of its pervasiveness, potency, and success in making the world a pornographic place. Specifically, the harm cannot be discerned from the objective standpoint because it *is* so much of 'what is'.... To the extent pornography succeeds in constructing social reality, it becomes *invisible as harm*. Any perception of the success, therefore the harm, of pornography, I will argue, is precluded by liberalism and so has been defined out of the customary approach taken to, and dominant values underlying, the First Amendment."

[45] T. Hommel, "Images of Women in Pornography and Media", (1978-79), 8 N.Y.U. Rev. L. & Soc. Change 207, at 207.

[46] See L. Steele, "A Capital Idea: Gendering in the Mass Media", in *Women Against Censorship*, *supra*, note 36, 58, at 63.

In determining whether pornography causes these harms, the attitude/behaviour distinction is a useful one. Many studies reveal changes in attitude that show desensitization and a willingness to suffer more violence. Whether these attitudes will translate into behaviourial changes is the contentious issue; some studies have been criticized as they have failed to draw distinctions between changes in attitudes and changes in behaviour, but apply "causation" broadly. For example, the Meese Commission[47] was criticized because it had data that supported attitudinal changes, but concluded that there were also behaviourial changes.[48] Similarly, one commentator has pointed out:[49]

> Social psychologist Edward Donnerstein, one of the experts cited, appeared before the full council two weeks later to stress that his studies showed the effects of violent images on attitudes, not the effects of sexually explicit materials on behavior. Donnerstein has since complained that his studies are being misused in anti-pornography campaigns.

The distinction between attitudinal and behaviourial change is related to the earlier liberal distinction between thought and conduct; as a society, we are perhaps less willing to interfere using a method such as censorship when it is attitudes or the thought process, and not overt conduct, that are being affected. If physical harm is not engendered, state censorship may not be defensible. Should the state be controlling purely attitudinal shifts?

The research on causation is inconclusive. Social science studies abound, yet the conclusions about the effects of pornographic materials are almost as numerous as the studies themselves. Some studies have concluded that there

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[47] *Supra*, note 10.

[48] A. D'Amato, "A New Political Truth: Exposure to Sexually Violent Materials Causes Sexual Violence" (1990), 31 Wm. & Mary L. Rev. 575, at 587.

[49] L. Duggan, "Censorship in the Name of Feminism", in Ellis *et al.*, *supra*, note 18, 62, at 65.

is a direct causal relationship between these materials and sexual violence.[50] Others have emphasized that no such conclusion may properly be drawn.[51]

Studies that do find a causal relationship have been criticized on methodological and theoretical grounds. For example, many social scientists are of the opinion that exposure to sexually violent material cannot be separated from other factors in an individual's personal history that contribute to sexual violence.[52] Related to this is the finding that many people who perform acts of sexual violence do so based on depictions contained in non-sexual stimuli, and often on depictions that most people view without any adverse effects.[53] Some problems are inherent in the

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[50] See, for example, Metro Toronto Task Force on Public Violence Against Women and Children, *Final Report* (1984), at 74, 75, referring to other studies, cited in L. Arbour, "The Politics of Pornography: Towards an Expansive Theory of Constitutionally Protected Expression", in J.M. Weiler and R.M. Elliot (eds.), *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 294, at 298. The Task Force concluded that violent and aggressive pornography is a direct contributor to violent and aggressive behaviour. Many researchers agree that desensitization results. See, for example, B.J. Wilson, D. Linz, and B. Randall, "Applying Social Science Research to Film Ratings: A Shift from Offensiveness to Harmful Effects" (1990), 34 J. Broadcasting & Electronic Media 443, at 452. Bear in mind, however, the distinction, discussed above, between attitudinal and behaviourial change. See, also, Ontario, *Report of the Royal Commission on Violence in the Communications Industry* (1976) (the "LaMarsh Commission") which sought to "study the effects on society of the increasing exhibition of violence in the communications industry". The Report concluded that "exposure to media violence can lead to aggressive or violent behaviour, although not in everyone all of the time.... [T]here is considerable complexity in the dynamics of violent and criminal acts being triggered by or copied from media presentations": *ibid.*, Vol. 1, at 27. See, also, the Report's conclusions: *ibid.*, Vol. 1, at 50-53.

[51] See, for example, Fraser Report, *supra*, note 10, which noted the inconclusiveness of the social science evidence (at 97). At 99, the Report states: "[T]he Committee is not prepared to state...that pornography is a significant causal factor in the commission of some forms of violent crime, in the sexual abuse of children, or the disintegration of communities and society". However, the Report found that pornography did have a serious impact on the fundamental values of Canadians (*ibid.*, at 103). Compare the statement that "studies of rape have failed to turn up evidence of pornography as instrumental to rape or to other acts of sexual assault": McCormack, *supra*, note 23, at 500. Compare also conclusions of Williams Report, *supra*, note 10. See, also, Hawkins, *supra*, note 17, at 166. In 1972, the L.W. Downey Research Associates in *Obscenity, Pornography, Censorship and Related Issues*[:] *A Report to The Select Committee on Censorship* (September 25, 1972), stated, at 15: "[I]t should be pointed out that it is not possible to establish a direct cause-effect relationship between an individual's exposure to erotic or violent materials and his subsequent behavior. Behavior patterns are developed in a complex social system which provides all kinds of inputs and cues for the individual."

[52] See, for example, M. Roth, "Pornography and society: a psychiatric view" in M. Yaffe and E.C. Nelson (eds.), *The influence of pornography on behaviour* (London: Academic Press, 1982) 1, at 12 and 15. See, also, W.A. Fisher and A. Barak, "Pornography, Erotica, and Behavior: More Questions than Answers" (1991), 14 Int'l. J.L. & Psychiatry 65, at 72. See, also, Downey, *supra*, note 51.

[53] For example, "A problem that arises in studying reactions to pornography among sex offenders is that they appear to generate their own pornography from nonsexual stimuli.... The sex offenders deduced a significantly greater number of sexual activities from the drawings (children playing near a tree, figure petting a dog, and three people standing

experimental milieu; it is unknown whether subjects are behaving in certain ways only because they are acting within the confines of an experiment in which their behaviour has no *real* impact.[54] Some studies are criticized because they confuse correlation and cause.[55] Biases in the way questions are asked in the studies have also been pointed out.[56] Finally, inherent constraints on what empirical studies can measure have been noted; that is, studies may show increased levels of pro-violent attitudes by increased exposure but[57]

> do not and cannot measure the effect of the general circulation of pornography in establishing a norm of dominating and exploitative sexuality throughout the culture, thus raising the general level of acceptability in violence in the ethos of the culture.

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unrelated to each other) than did the nonsex offenders": M.J. Goldstein and H.S. Kant, *Pornography and Sexual Deviance* (Berkeley, Cal.: University of California Press, 1973), at 31, cited by F. Berger, "Pornography, Sex, and Censorship", in D. Copp and S. Wendell (eds.), *Pornography and Censorship* (Buffalo, N.Y.: Prometheus Books, 1983) 83, at 95. See, also, E. Donnerstein and D. Linz, "Mass Media, Sexual Violence and Male Viewers: Current Theory and Research" in Kimmel, *supra*, note 40, 219, at 223: "This research suggests that violence against women need not occur in a pornographic or sexually explicit context in order for the depictions to have an impact on both attitudes and behavior. Angered individuals became more aggressive toward a female target after exposure to films judged not to be sexually arousing but that depict a woman as a victim of aggression. This supports the claim by Malamuth and Check [reference omitted] that sexual violence against women need not be portrayed in a pornographic fashion for greater acceptance of interpersonal violence and rape myths." For an interesting perspective on this, see M.S. Kimmel, "'Insult' or 'Injury': Sex, Pornography, and Sexism", in Kimmel, *ibid.*, 305. At 309, he refers to Nicholas Groth's conclusion to *Men Who Rape: The Psychology of the Offender* (New York: Plenum Press, 1979): "'It is not sexual arousal but the arousal of anger that leads to rape'. He concludes that 'pornography does not cause rape, banning it will not stop rape'. But such assertions beg the question: Why are men so angry at women? Everywhere, men are in power, controlling virtually all the economic, political, and social institutions of society. And yet individual men do not feel powerful—far from it. Most men feel powerless and are often angry at women, who they perceive as having sexual power over them: the power to arouse them and to give or withhold sex. This fuels both sexual fantasies and the desire for revenge." Compare Mize, *supra*, note 35, at 607, who refers to incidents of misogynist acts occurring after viewings of "Roots" and "The Ten Commandments".

[54] B. Kutchinsky, "Pornography and Rape: Theory and Practice?" (1991), 14 Int'l. J.L. & Psychiatry 47, at 49. He points out other problems with the earlier studies as well. Other problems with laboratory experiments are listed in Linz, Donnerstein, and Penrod, *supra*, note 41, at 722.

[55] See J. Becker and R.M. Stein, "Is Sexual Erotica Associated With Sexual Deviance In Adolescent Males?" (1991), 14 Int'l. J.L. & Psychiatry 85, at 87. The Meese Commission, *supra*, note 10, was also criticized on the ground that it assumed correlation was the same as causation. See D'Amato, *supra*, note 48, at 592 and 600.

[56] T. McCormack, "Machismo in Media Research: A critical Review of Research on Violence and Pornography" (1978), 25 Soc. Probs. 544, at 549.

[57] H. Brod, "Eros Thanatized: Pornography and Male Sexuality", in Kimmel, *supra*, note 40, 190, at 197.

Studies that do not find a causal connection have also been criticized. The problem may sometimes lie in the definition; in one study that concluded that no aggressive behaviour resulted, the subjects were shown sexually explicit but not violent or degrading materials.[58] Discussions concerning lack of causation often focus on Danish data. In 1969, pictorial pornography was legalized in Denmark. Since that time, many conflicting studies regarding the causation issue have emerged from that country. Some social scientists assert[59] that there has been a dramatic decrease in sex crimes in Denmark since pornography has become readily available.[60] However, many others have contested these conclusions and criticized the data upon which they are based.[61] The Danish data on the whole are conflicting and inconclusive.[62]

An important question that underlies the causation debates is: what must we find in order to conclude that the subject-matter should be regulated? For some, as shown above, pornography can be regulated only if it causes

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[58] See D.L. Mosher and H. Katz "Pornographic Films, Male Verbal Aggression Against Women, and Guilt" (1971), 8 Technical R. of Commission on Obscenity & Pornography 357, at 377. Interestingly, the same criticism was levelled at the Meese Commission, *supra*, note 10, which did find a causal connection. See Linz, Penrod, and Donnerstein, *supra*, note 41, at 713-14.

[59] See, for example, B. Kutchinsky, "The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience", in Copp and Wendell, *supra*, note 53, at 295. Brest and Vandenberg, *supra*, note 42, at 648, cite social scientists who maintain that the most permissive societies have the "greatest degree of gender equality both in attitudes and in practice". See, also, B. Kutchinsky, "Legalized Pornography in Denmark", in Kimmel, *supra*, note 40, at 233.

[60] This is an example of the catharsis theory which holds that individuals will fantasize using available pictures, and thus will not have to act out their fantasies on human beings.

[61] D.E.H. Russell (ed.), "Testimony Against Pornography: Witness from Denmark", in L. Lederer (ed.), *Take Back the Night*[:] *Women on Pornography* (New York: William Morrow & Co., 1980) 82, asserts that the pro-pornography arguments from Denmark are suspect. Compare harsh statistics given in I. Diamond, "Pornography and Repression: A Reconsideration of 'Who' and 'What'", in Lederer, *ibid.*, 187, at 200. Some allege that rape was not one of the sex offences that decreased after 1969 in Denmark; those were milder "peeping tom" type of offences. P.B. Bart and M. Jozsa, "Dirty Books, Dirty Films, and Dirty Data", in Lederer, *ibid.*, 204, at 208. At 209, Bart and Jozsa raise the real possibility of women being less likely to report sex crimes because of changing social attitudes such as greater acceptance of such crimes. At 211, they cite a study that showed "a positive relationship between 'sexual deviance' and exposure to pornography at all age levels".

[62] See, for example, Bart and Jozsa, *ibid.*, at 216, and Williams Committee, *supra*, note 10, at 80-86. Compare the findings with respect to pornography effects research in general: "[T]he findings for the prevalence and effects of pornography are highly inconsistent, are often based on overly simplistic theory and on methodologically flawed research, and only permit the conclusion that there remain far more questions than firm answers in this area": Fisher and Barak, *supra*, note 52. See, also, Roth, *supra*, note 52, at 18 *et seq.*

behaviourial changes that lead to physical harm. A further issue is the quantity of harm that must be caused in order to justify regulation. According to some,[63]

> Too much time and money is spent searching for a relationship between pornography and the deterioration of the moral fabric of our society. This time and money is wasted. The efforts of legal commentators should not focus on the quantity of harm. The harm to one child is enough for one to acknowledge that the harm is very great.

For some, pornography should be regulated not only if there is a direct causal relationship between it and specific harm, but even if it can be shown that pornography is "in any way implicated in the abuse of women".[64] Others ask "*how much* research is truly required before it can be acknowledged that a mass industry, which thrives by selling images of beaten, raped, degraded and objectified females, has a negative impact on the lives and opportunities of women"?[65]

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[63] J.L. Kirchmeier, "Comment[:] The Price We Pay for Pornography: A Karamazov View" (1988-89), 39 Case Western Reserve L. Rev. 1395, at 1404. Compare the chilling account of one rapist set out in T. Beneke, "Interview with a Rapist", in Kimmel, *supra*, note 40, 43, at 45:

> I'd shot up some heroin and done some downers and I went into a porno bookstore, put a quarter in a slot, and saw this porn movie. It was just a guy coming up from behind a girl and attacking her and raping her. That's when I started having rape fantasies. When I seen that movie, it was like somebody lit a fuse from my childhood on up.... The movie was just like a big picture stand with words on it saying go out and do it, everybody's doin' it, even the movies.
>
> So I just went out that night and started lookin'. I went up to this woman and grabbed her breast; then I got scared and ran. I went home and had the shakes real bad, and then I started likin' the feeling of getting even with all women."

At 49 [Question:] *If there had been no pornographic movies showing rape, would you have raped?*

> I think I would've hurt a woman in a different way physically. If I wouldn't have committed rape, I'd be in prison for murder right now, because it was goin' that way....
>
> Pornographic movies have a lot to do with rape. I believe they shouldn't make movies of *any* kind of rape. They just shouldn't show it. Specials are okay because they can tell what can happen in a rape, but a TV movie, a porn movie, or a regular movie about rape—they should ban them. You look at these movies and think, 'Wow, I wonder what it would be like to go out and rape somebody!'"

[64] Lahey, *supra*, note 39 at 128.

[65] M.L. Klausner, "Redefining Pornography as Sex Discrimination: An Innovative Civil Rights Approach" (1984-85), 20 New Eng. L. Rev. 721, at 739.

This latter group relies largely on a common sense obviousness to support their claim;[66] its claim is that, intuitively, the mass circulation of degrading depictions of women cannot help the position of women in contemporary society. This, however, does not lead us to an answer to the question of whether the appropriate response is censorship of the materials.[67]

Further, many studies have shown that efforts at education to re-sensitize subjects after desensitization occurs have been very successful.[68] Positive educational campaigns may prove to be both a less restrictive and a more effective method for combatting the adverse effects of this material.[69]

b. Conclusions on Issue of Causation

It is obvious that no firm conclusions can be drawn on the issue of behaviourial change from exposure to pornography.[70] However, there is some social science evidence of attitudinal changes and of a correlation of exposure and use of materials to sexual violence. As well, some studies support the notion of behaviourial causation.

As noted in the discussion of the constitutionality of censorship methods in chapter 3 of this Report, the legislatures must be allowed a "margin of

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[66] "Their strength lies in the obvious: pornography may not be harmful, but it is no help. It is a factor that makes the achievement of such feminist goals as pay equity, day care, and reproductive choice more difficult": McCormack, *supra*, note 23, at 502.

[67] For instance, this kind of reasoning leads directly to a much larger issue. The media abound with images of women that are stereotypical, insulting, and degrading. Even if it were possible, would censorship of all these images be desirable? Compare these words of N.D. Hunter and S.A. Law, "Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al., in *American Booksellers Association v. Hudnut*" (1987-88), 21 U. Mich. J.L. Reform 69, at 101, referring to the anti-pornography ordinance: "While the sweep of the ordinance is breathtaking, it does not address (nor would Amici support state suppression of) the far more pervasive commercial images depicting women as primarily concerned with the whiteness of their wash, the softness of their toilet tissue, and whether the lines of their panties show when wearing tight slacks. Commercial images, available to the most impressionable young children during prime time, depict women as people interested in inconsequential matters who are incapable of taking significant, serious roles in societal decision-making."

[68] See Fisher and Barak, *supra*, note 52, at 79-80; Linz, Penrod, and Donnerstein, *supra*, note 41, at 734-36; N.M. Malamuth, "Aggression against Women: Cultural and Individual Causes", in Malamuth and Donnerstein, *supra*, note 11, 19, at 46; and Donnerstein and Linz, *supra*, note 40.

[69] Compare the conclusion in A. Martinez, *Scientific Knowledge about Television Violence* (Canadian Radio-television and Telecommunications Commission), at 47.

[70] See *ibid.*, conclusion, and D. Atkinson and M. Gourdeau, *Summary and Analysis of Various Studies on Violence and Television* (Canadian Radio-television and Telecommunications Commission, June 1991), at 14-15.

appreciation" within which to act when legislative measures are taken on the basis of social science data. Thus, legislatures should be permitted to take measures designed to curtail the apprehended harms of pornography.

The data on causation are inclusive. For the purposes of this Report, the Commission will proceed on the basis that the Legislature is entitled to assume some form of causation. However, as noted above, this does not resolve the issue of whether the institution of a state-sponsored censorship board is a wise, effective, or desirable measure. This, of course, is the question that animates this entire Report, and it would be precipitous to answer it at this point.

(b) The Feminist Approach

In recent years, the major challenge to liberal thought about pornography has arisen from the feminist vision of the issue. Feminist theory differs from liberal theory in various significant respects, a few of which should be noted here. For example, feminism rejects the atomistic liberal emphasis on the individual and the concomitant opposition set up between the individual and the state. Feminism tends not to see individuals acting freely within a circumscribed space, carved out from the power of the state, but sees society as a composite web of human interactions. Freedom is generally regarded not as freedom from the state, but as positive freedom to achieve various ends. Feminist theory aims at building itself upon the basis of lived experiences; it resists the approach of building a theory from abstract principle and then applying it to social life. Feminist theory has brought attention to systemic biases built into the liberal framework as it has evolved and aims at a more inclusive theory.

Like the liberals, the feminists writing about pornography are deeply divided both about the existence of the material itself and about what should be done to regulate it.[71] Some feminists go so far as to describe opposing feminist views as being the products of a socially constructed false consciousness. Of course, such claims presume that there is only "one accurate reading of women's experience".[72] Many anti-regulation feminists

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[71] A graphic example of this occurred in the United States, with the proliferation of groups on both sides of the issue galvanized by reactions to the Dworkin/MacKinnon ordinance, *infra*, note 154. Academic writing also reflects strongly held views on both sides of the issue by scholars who all consider themselves feminist. See V. Burstyn, "Introduction", in *Women Against Censorship*, *supra*, note 36, 1, at 3.

[72] C. Spaulding, "Anti-Pornography Laws As A Claim For Equal Respect: Feminism, Liberalism & Community" (1987-90), 4 Berkeley Women's L.J. 128, at 145. The basis of feminist theory is women's experience; it is a theory built upon experiences. The diversity of women's experience thus creates an obstacle to building a unified theory. Compare, D. Lacombe, *Ideology and Public Policy*[:] *The Case Against Pornography* (Toronto:

are of the opinion that their views have not been publicized; rather, there tends to be an association of "feminism" with censorship and legal reform in the public eye.[73] Such a one dimensional description of feminist writing is misleading.[74] For some, the issue of pornography is central;[75] for others, not so at all.[76] The definitional stage is also an important one in the feminist point of view; they tend to focus on the abuse, the degradation, and the condoning and encouraging of such abuse and degradation in sexually violent materials.[77] Pornography has been referred to as "the prejudice of a patriarchal society".[78]

(i) Feminist Pro-Regulation

An important re-conception of the issue that has been brought about primarily by those feminists who favour regulation of some kind, although not necessarily censorship, is to see pornography not as a moral issue[79] but

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Garamond Press, 1988), at 105: "In light of the fact that some women (feminist or not) enjoy sado-masochistic sexual practices and/or images/texts, the anti-pornography feminist discourse stating that such practices are a 'lie' about women's sexuality, reflects a certain moralism usually associated with conservatives."

[73] See Burstyn, *supra*, note 37, at 22.

[74] It is important, however, to remember that there are certain bases of unity. Some of these have been described as follows: "Feminists on all sides of this debate share the desire to 'take back the night'; to own our sexual selves; to express these selves in images of our own choosing. We share a feminist anger about women's sexual exploitation and a desire to leave the impress of this feeling—our recognition of profound injustices that reach to the core of identity—upon the world": A. Snitow, "Retrenchment vs. Transformation[:] the politics of the antipornography movement", in Ellis *et al.*, *supra*, note 18, 10, at 14.

[75] See, for example, A. Dworkin, *Pornography*[:] *Men Possessing Women* (New York: Perigee Books, 1979), at 224: "We will know that we are free when the pornography no longer exists."

[76] Burstyn, *supra*, note 37; Duggan, Hunter, and Vance, *supra*, note 37; Snitow, *supra*, note 74, at 16; and Lacombe, *supra*, note 72, at 44.

[77] See Mahoney, *supra*, note 41, at 42-43. See, also, M. Wesson, "Sex, Lies and Videotape: The Pornographer as Censor" (1991), 66 Wash. L.Rev. 913, at 915, which includes a lack of consent in the definition ascribed to the "new hard core" pornography. See, also, Hoffman, *supra*, note 33, at 520; and G. Steinem, "Erotica and Pornography[:] A Clear and Present Difference", *MS Magazine* (November 1978). Some, however, point out: "Of course, I make my own definitions, everyone does...": S. Tisdale, "Talk Dirty to Me[:] A woman's taste for pornography", *Harper's Magazine* (February 1992) 37, at 42. Tisdale goes on to offer: "one definition of pornography: whatever we will not talk about": *ibid.*, at 43.

[78] T. McCormack, "Must We Censor Pornography? Civil Liberties and Feminist Jurisprudence", in D. Schneiderman (ed.), *Freedom of Expression and the Charter* (Toronto: Thomson, 1991) 180, at 186.

[79] The "moral" view has been put forth in American obscenity judgments; the counter to those judgments has also been expressed in terms of morality, for example: "I am opposed to all forms of censorship because I believe the American people are capable of reading and seeing anything without being morally corrupted". H.P. Fahringer, "'If the Trumpet Sounds an Uncertain Note...'" (1978-79), 8 N.Y.U. Rev. L. & Soc. Change 251. See, also,

as one that has an enormous impact on the concrete realities of women's lives and causes direct harm thereto.[80]

Feminist pro-regulation writers[81] take issue with the liberal categorization of the pornography debate as one about freedom. At the root of the suspicion of casting the argument in these terms lies a concern with the "disparities in both the meanings and practices of "freedom" that are available to women and men in contemporary culture".[82] Part of the lack

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K.E. Mahoney, "Defining Pornography: An Analysis of Bill C-54" (1988), 33 McGill L.J. 575, at 578.

[80] MacKinnon, *supra*, note 44; and C.A. MacKinnon, *Toward A Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989), at 195-97, 199. Compare S.G. Cole, *Pornography and the Sex Crisis* (Toronto: Amanita Enterprises, 1989), at 95: "As long as law is constructed to address the abstract idea of morality instead of the concrete realities of women's lives, the law is bound to be ineffective". This re-conception was addressed by the Supreme Court of Canada in considering the purpose of obscenity legislation in *Butler*, *supra*, note 7. See *infra*, ch. 3, sec. 2(b)(ii)a of this Report. This differs greatly from the approach of the United States Supreme Court, which has held that obscenity is not protected under the First Amendment because "any benefit that may be derived from [such utterances] is clearly outweighed by the social interest in order and morality": *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, at 572, 62 S. Ct. 766, at 769 (1942); See, also, *Miller v. California*, 413 U.S. 15, at 17-23, 93 S. Ct. 2607, at 2611-14 (1973). Compare S. Edwards, "A Plea for censorship" (1991), 141 New L.J. 1478. See, also, Wesson, *supra*, note 77, at 919. The re-conception is related to the feminist approach of building on experience, sometimes stated as the discovery "that experience and theory are not separate things": S.G. Cole, Book Review of *Women Against Censorship* (1985), 1 Can. J.Women & L. 226. See R.F. Devlin, "Nomos and Thanatos (Part B). Feminism as Jurisgenerative Transformation, or Resistance Through Partial Incorporation?" (1990), 13 Dalhousie L.J. 123, at 190.

[81] Within the confines of the feminist debate, the factions are more easily separated into the pro-regulation and anti-regulation groups, rather than pro- and anti-censorship groups. This is because even those feminists who support methods such as the ordinance, discussed *infra*, this ch., sec. 4, consider themselves anti-censorship. See, for example, MacKinnon, *supra*, note 34, at 140: "I want to increase women's power over sexuality, hence over our social definition and treatment. I think that means decreasing the pornographers' power over it. I have no particular interest in increasing the power of the *state* over sexuality or speech. I do not have that kind of faith in the government".

[82] K.A. Lahey, "The Charter and Pornography: Toward a Restricted Theory of Constitutionally Restricted Expression", in Weiler and Elliot, *supra*, note 50, 265, at 267. She goes on to ask: "How can something be experienced by one person as 'freedom' at the same time that it is experienced by another as violence, oppression, containment, or some other variant of nonfreedom?": *ibid.* See, also, Wesson, *supra*, note 77, at 922-23. One woman stated the issue this way: "In my life nothing compares to the freedom of equality, the freedom of not feeling fear and being sexually harassed, the possibility of being sexually raped, the possibility of sexual abuse in another form of rape. I would give my freedom of speech up in two seconds flat if I knew myself, as well as my daughter, as well as my husband and all my neighbors, didn't have to face the garbage that results from the Faust, the Flick and the Belmont Club": *Public Hearings on Minneapolis Ordinance*, *supra*, note 42, at 82. The issue of freedom is related to that of neutrality; feminists criticize the liberal notion that neutrality exists and assert that the state regulation will only be neutral in its regulation when it operates within a climate of equality between the genders. See Hoffman, *supra*, note 33, at 531. On neutrality, see also King, *supra*, note 36, at 84.

of freedom is seen to exist in terms of access to media resources;[83] thus women's voices are viewed as at least unheard, and at worst, actively silenced.[84] However, against this it has been suggested that "the proper operation of the marketplace of ideas does not depend upon an equality of access to media resources. It is a battle of persuasion, and winning depends on the strength of one's argument rather than the number of times it is repeated".[85] Of course, pro-regulation writers argue that they are unable to persuade because of lack of access to the market; they focus on historical factors that have led to the silencing of the views of women.[86] These writers see regulatory methods designed to enhance women's access to the marketplace as a kind of affirmative action, required to put themselves on equal ground with others whose speech has historically dominated public discourse.[87]

(ii) Feminist Anti-Regulation

Anti-regulation feminists, on the other hand, are of the view that separating liberation and equality is counterproductive; freedom of expression is required to achieve both of these major goals of the feminist movement.[88] Thus while they may not disagree that they do not enjoy the same freedoms and access as do men, their proposed solutions to denied access are different.[89] This group of feminists harbour a deep-seated suspicion of the state.[90] A response that involves the use of the state to

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[83] See Burstyn, *supra*, note 37, at 22.

[84] See Fiss, *supra*, note 27. For an account of the silencing effect, see Dworkin, *supra*, note 39, at 17-20. Compare J. Baat-Ada, "Freedom of Speech as Mythology, or 'Quill Pen and Parchment Thinking' in an Electronic Environment" (1978-1979), 8 N.Y.U. Rev. L. & Soc. Change 271, who refers to the "myth that freedom of speech and of the press exist in this country" and asserts that "a pornographic environment by its very nature is undemocratic and antidemocratic and a threat to free speech and to humane survival". See, also, *ibid.*, at 272.

[85] Mize, *supra*, note 35, at 609.

[86] For accounts of how this silencing occurs, see MacKinnon, *supra*, note 34, at 140-41, and MacKinnon, *supra*, note 44, at 156. See, also, K.A. Lahey, "The Canadian Charter of Rights and Pornography: Toward a Theory of Actual Gender Equality" (1984-85), 20 New Eng. L. Rev. 649, at 662.

[87] See, for example, MacKinnon, *supra*, note 34, at 140-41.

[88] McCormack, *supra*, note 78, at 207. Many are of the view that the "abolition of speech rights would not be desirable for feminists": Spaulding, *supra*, note 72, at 164. Compare Mize, *supra*, note 35, at 612. See, also, Ellis, O'Dair, and Tallmer, *supra*, note 18, at 6-8.

[89] "Lesbians have few, if any, bookstores to be raided or defended: for us, freedom of speech is not an existing freedom to be defended but a goal to work toward": M. Valverde and L. Weir, "Thrills, Chills and the 'Lesbian Threat' or, the Media, the State and Women's Sexuality", in *Women Against Censorship*, *supra*, note 36, 99, at 105.

[90] See Burstyn, *supra*, note 37, at 16.

censor or heavily regulate may be inappropriate; perhaps it is true that "[b]y resisting the temptation to censor pornography, we are turning back a state that deliberately manipulates our anxieties about sexuality and control. It is a political act.... [I]t is not a form of passive indifference".[91]

These voices parallel a recent movement of some feminists away from characterizing arguments on a variety of topics in ways that paint women as victims, inferior to men in their ability to function in the world and protect and defend themselves.[92] Instead of portraying women as victims requiring the state's assistance in removing negative images of them from the public domain, anti-regulation feminists prefer to take counter-action:[93]

> We've gone off in the wrong direction. Instead of using our anger and energy to simply fight 'against', we really need to be fighting 'for'. For example, if a film is offensive, pornographic, violent—don't just call for its removal, go down to the theatre with a list of woman-positive, woman-produced films that you want to see screened. Don't stop your protest, your letter writing until this is accomplished.... Demands for equal distribution space for feminist publications serve to highlight woman-produced media rather than strengthening the economic position of porn—as many current anti-porn protests do.

Related to this refusal to see themselves as victims is a branch of writing that encourages women to explore the limits of sexuality. This writing takes issue with feminist anti-pornography legislation such as the ordinances:[94]

> I take this personally, the effort to repress material I enjoy—to tell me how wrong it is for me to enjoy it. Anti-pornography legislation is directed at me: as a user, as a writer....

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[91] McCormack, *supra*, note 78, at 205. Compare Hoffman, *supra*, note 33, at 499: "From a political perspective...feminists should probably avoid endorsing state regulation of pornography. Feminists have reasons for being suspicious of the power of the state, which has historically been, and seems likely to remain, male-dominated".

[92] See R. Benson, "Pornography and the First Amendment[:] *American Booksellers v. Hudnut*" (1986), 9 Harv. Women's L.J. 153, at 171-72. This is why many feminists shy away from likening women's role in the production of pornography to the role of children in child pornography as set out in *New York v. Ferber*, 102 S. Ct. 3348, 458 U.S. 747 (1982). Compare S. Diamond, "Pornography: Image and Reality", in *Women Against Censorship*, *supra*, note 36, 40 at 52. On the other hand, there are those who see the social subordination of women as having coercive consequences; thus, the portrayal of women as victims is not inaccurate. See Hoffman, *supra*, note 33, at 517. See, also, Hunter and Law, *supra*, note 67, at 128. Brest and Vandenberg briefly discuss the two sides of the "victim debate": see Brest and Vandenberg, *supra*, note 42, at 639.

[93] Steele, *supra*, note 46, at 75. See, also, S. Rimer, "Television That's Just for Women... and Men", *New York Times* (November 11, 1991) D9. See, also, Ellis, O'Dair, and Tallmer, *supra*, note 18, at 6.

[94] Discussed *infra*, this ch., sec. 4(c).

> That branch of feminism tells me my very thoughts are bad. Pornography tells me the opposite: that *none* of my thoughts are bad, that anything goes. Both are extremes, are course, but the difference is profound. The message of pornography, by its very existence, is that our sexual selves are real.
>
> Always, the censors are concerned with how men *act* and how women are portrayed. Women cannot make free sexual choices in that world; they are too oppressed to know that only oppression could lead them to sell sex. And I, watching, am either too oppressed to know the harm that my watching has done to my sisters, or—or else I have become the Man. And it is the Man in me who watches and is aroused. (Shame.) What a misogynistic worldview this is, this claim that women who make such choices cannot be making free choices at all—are not free to make a choice. Feminists against pornography have done a sad and awful thing: *They* have made women into objects.[95]

The messages here are complex, and the fundamental assertion is an important one. For these women, to relinquish decisions over what can and what cannot be viewed is to relinquish power over their lives and selves. Some feminist groups have asserted that "sexuality is, for women, a source of pleasure and power, as well as a realm of danger and oppression".[96] More recently emerged feminist writers tend to focus on other ideas as ways of changing negative images of women in *all* media.

(c) Gay Pornography

One strand of the gay and lesbian literature on pornography is similar to one particular branch of the feminist literature; it is typically suspicious of

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[95] Tisdale, *supra*, note 77, at 44-45. Tisdale's articles engendered many passionate responses: see Letters, in *Harper's* (May 1992), at 4-7, 72, 73, 76-78. See, also, P. Webster, "Pornography and Pleasure", in Ellis *et al.*, *supra*, note 18, 30, at 35; and Duggan, Hunter, and Vance, *supra*, note 37, at 150-51.

[96] Hunter and Law, *supra*, note 67, at 74. The brief sets out a similar belief to that suggested above by Tisdale, *supra*, note 77, namely, that an effort such as the ordinance "reinforces rather than undercuts central sexist stereotypes in our society and would result in state suppression of sexually explicit speech, including feminist images and literature, which does not in any way encourage violence against women": Hunter and Law, *supra*, note 67, at 89. See, also, *ibid.*, at 100-01 and 127.

state involvement in censorship and more likely to encourage material that is sexually adventurous. Gay material has often been singled out by customs,[97] film boards,[98] and the judiciary.[99]

Some of the literature about gay pornography has brought attention to the problems that emerge from a failure "to differentiate between heterosexual pornography and gay male pornography" in terms of a model of legal regulation; the most important of these problems for purposes of the present discussion is that: "[T]he feminist pornography critique is insensitive to the change in the meaning of pornographic representation in a homosexual context. In a gay male context, pornography ceases to be oppressive."[100] Further, these writers point out that "[s]tate and social censorship does not operate uniformly against all forms of sexual presentation. Sexual presentations of gay sex have generally been seen as more dangerous than similar heterosexual portrayals".[101] However, other gay male writers see gay male pornography as equally discriminatory as heterosexual material.[102] The view expressed by these writers is that the objective of ending sex inequality, which can be achieved by supporting regulatory methods such as the anti-pornography ordinances, will assist the achievement of gay liberation and gay rights.[103]

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[97] Note, for example, the recent customs seizure of gay literature destined for Glad Day Bookshop in Toronto, upheld by Hayes J. in *Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Custom and Excise—M.N.R.)*, not yet reported (July 14, 1992, Ont. Gen. Div.).

[98] For example, "[i]n 1984, the board initially ordered cuts in the militantly feminist and prolesbian *Born in Flames* and only retreated after a public outcry. In fact, many distributors of films about gays or with gay content will not send their films to Ontario": King, *supra*, note 36, at 82.

[99] See examples, in Valverde and Weir, *supra*, note 89, at 105.

[100] C.F. Stychin, "Exploring the Limits: Feminism and the Legal Regulation of Gay Pornography" (1992), 16 Vt. L. Rev. 857. The same author takes issue with the definition of sexuality in much literature about pornography: "Sexuality, as the tool of male domination in a patriarchal society, becomes equated with heterosexuality because, in the final analysis, sexuality is *defined* in terms of the dominance of men and the submission of women": *ibid.*, at 859 (footnote omitted). Compare G. Kinsman, "Porn/Censor Wars and the Battlefields of Sex", in *Issues of Censorship*, *supra*, note 32, 31, at 34. Similarly, the Dworkin/MacKinnon ordinance, *infra*, note 154, has been criticized because it makes assumptions based on heterosexuality; for example, it was suggested that "[d]oubtless there are heterosexual women who believe that lesbianism is a 'degrading' form of 'subordination'": Duggan, Hunter, and Vance, *supra*, note 37, at 147.

[101] Kinsman, *supra*, note 100, at 35.

[102] J. Stoltenberg, "Gays and the Propornography Movement: Having the Hots for Sex Discrimination" in Kimmel, *supra*, note 40, 248. The ambivalence of the gay movement on this issue was captured by a participant in the *Public Hearings on Minneapolis Ordinance*, *supra*, note 42, at 88-89.

[103] Stoltenberg, *supra*, note 102, at 253.

The first of the models set out above most clearly resembles feminist writers who look to this material as liberating, and who reject both the notion of being labelled as victims and traditional sexuality-based stereotypes.[104] Both of these approaches urge us to accept sexuality and a broad variety of sexual impulses as natural human behaviour to be explored rather than automatically discouraged.[105] Related to this is a broader concern, not confined to any particular group but common to all who see pornography as one expression of an inherent aspect of being human, and that is: "Is it practical to wage war against pornography...? What would you propose in its stead?"[106]

Some of the lesbian literature concerning the censorship of pornography has been referred to above.[107] Many of these writers are suspicious of state censorship; the dangers of censorship in the hands of the state[108] are often seen as too great to permit this kind of regulation, even though an anti-censorship lesbian writer may be "chilled by the blatant misogyny inherent in most pornography".[109] This is not, however, to suggest that the lesbian community speaks in one voice on this issue; the topic is as divisive for it as for the other communities.

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[104] See *supra*, this ch., sec. 2(b)(ii). These writers represent relatively new schools of thought; at one time almost all thinking on the issue was captured in statements such as these: "Both the libertarians and the would-be censors agree in reducing pornography to pathological symptom and problematic social commodity": S. Sontag, "The Pornographic Imagination" (1967), in S. Sontag, *Styles of Radical Will* (New York: Farrar, Straus & Giroux, 1969) 35, at 37.

[105] Sontag's essay was, in fact, an early example of this; she writes: "Tamed as it may be, sexuality remains one of the demonic forces in human consciousness—pushing us at intervals close to taboo and dangerous desires, which range from the impulse to commit sudden arbitrary violence upon another person to the voluptuous yearning for the extinction of one's consciousness, for death itself.... These phenomena form part of the genuine spectrum of sexuality, and if they are not to be written off as mere neurotic aberrations, the picture looks different from the one promoted by enlightened public opinion, and less simple": *ibid*, at 57. See, also, *ibid.*, at 68 and 70-71. Compare the words of T. McCormack, "Feminism, Censorship, and Sadomasochistic Pornography", in T. McCormack (ed.), *Studies in Communications*, Vol. 1 (Greenwich, Conn.: Aijai Press, 1980) 37, at 41: "It was Freud, perhaps, more than anyone who shifted the onus to the censors by suggesting that the psychology of the censor was the other side of a sexual pathology". See, also, M.S. Kimmel, "Introduction: Guilty Pleasures—Pornography in Men's Lives", in Kimmel, *supra*, note 40, at 1: "What matters with pornography is its utility, its capacity to arouse. Its value appears to be contained in its function".

[106] L. Lopate, "Renewing Sodom and Gomorrah", in Kimmel, *supra*, note 40, 25, at 29. See, also, D. Steinberg, "The Roots of Pornography", in Kimmel, *supra*, note 40, 54, at 58; and R. Goldstein, "Pornography and Its Discontents", in Kimmel, *supra*, note 40, 81, at 84-85.

[107] See *supra*, notes 89, 98, and 100 and accompanying texts.

[108] Compare *supra*, notes 89-91 and accompanying text.

[109] See Brest and Vandenberg, *supra*, note 42, at 639.

3. CONCLUSIONS ON ISSUE OF PORNOGRAPHY

Interestingly, it can be seen that curious alliances are formed in the theoretical and practical approaches to the regulation of pornography.[110] The traditional liberal approach which concludes that censorship is unjustified and ineffective finds an echo in some of the more recent feminist writings. These two anti-regulation groups reject the authority of the state over these matters, and assert that more effective means to combat objectionable ideas and expression are available and should be used.

On the other hand, the modified liberal approach is not dissimilar from the approach of the early prominent feminists. Each of these groups sees harm resulting from this kind of expression, and is comfortable relying on state intervention to combat this harm. While the modified liberals might start out with a more hostile view to censorship than do the early feminists, they end by concurring that this kind of regulation is permissible. These feminists might not cast the debate in terms of restriction of freedom of expression; they may prefer to see the issue as a positive approach to achieving gender equality, but their conclusions in terms of apposite regulation are essentially the same as those of the modified liberals.

This brief examination of the issue of pornography demonstrates that the area is one that is with rife with difficulties. For the purposes of this Report, it is most important to take away from this discussion a number of questions.

First, even assuming a workable definition is agreed upon, what is it that is different about pornography that warrants the institution of a specific legal regime[111] for its regulation?[112] The subsidiary issue of whether that specific regime ought to be a film board with power to require eliminations from films or prohibit films from being shown will become clearer after the discussions in section 4 below, and chapters 3 and 4 of this Report.

Second, is the passing of legislation an appropriate response? It is evident from the discussion of causation above and many of the submissions received that there is a tendency among those who favour legislation to think that the law itself is an answer. Aside from the pitfalls noted above regarding

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[110] Some underlying theoretical differences among those who are allied against censorship are discussed in Kinsman, *supra*, note 100, at 38.

[111] As noted above, the Film Review Board has the power to regulate or censor many images, not only pornographic ones. However, by far the majority of its censorship efforts focus on pornographic images. It is this material that forms the basis of concern in contemporary society. This was revealed in the legislative debates concerning the 1984 amendments to the *Theatres Act*: see Ontario Legislative Assembly, *supra*, note 5.

[112] See, for example, Mize, *supra*, note 35, at 600.

suspicion of the state, this may be a dangerous point of view for the additional reason that it may cause people to abdicate responsibility to take individual action of a positive kind. After all, legislation of many kinds[113] is already in place, yet the problem is seen to persist. By relying on censorship, would we be permitting ourselves to be distracted from the task of searching for solutions to some profound and distressing problems?

Related questions have been expressed above. Does legislation deal with the root of the problem or merely its most obvious symptoms? No matter what type or types of regulation of pornography are ultimately deemed appropriate by a society, it is important to bear in mind that such regulation is only one aspect of dealing with the larger issue of the harm that is correlational with pornography. That is,[114]

> the simple solutions to gender inequality that are suggested by the scapegoating of pornography leave unexamined the way sexuality is distributed through our social institutions....

Finally, it must be remembered that we are dealing with a philosophical and political decision that we deem appropriate to our society; we cannot expect the answers to emerge for us ready-made as a simple total of social science evidence.[115]

4. OTHER METHODS OF REGULATION

The issue of pornography arises in different forms and within different contexts in contemporary society. Each particular circumstance, viewed in isolation, engenders its own responses; the result is that many divergent methods are advocated or used to regulate pornography. The methods differ in terms of their premises as well as their goals. Further, as we have seen, both levels of government are involved in the regulation of this material. Some of the methods overlap, some may operate effectively concurrently, while others may interfere with one another. The methods differ in important ways. Some involve criminal prosecution after the expression occurs, others such as municipal by-laws aim solely at regulating the "time, place and

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[113] See *infra*, sec. 4.

[114] A. Brannigan and S. Goldenberg, "Pornography, Context, and the Common Law of Obscenity" (1991), 14 Int'l. J.L. & Psychiatry 97, at 113-14. See, also, Lacombe, *supra*, note 72, at 102.

[115] Compare the words of Linz *et al.* discussing the judicial approach in the *Hudnut* case, *infra*, notes 151-153: "What is interesting about the decisions is the courts' recognition that no amount of social science evidence about the alleged harms of exposure to pornography can simplify the essential philosophical decision about which harms society is willing to tolerate": Linz, Penrod, and Donnerstein, *supra*, note 41, at 728.

manner" of the expression but permit it go ahead, and still others allow the expression to proceed but would submit it to civil actions for any harm it causes. A brief discussion of these proposed and existing methods will assist in situating the Ontario Film Review Board within its broader context.

(a) Criminal Law

In the Law Reform Commission of Canada's Working Paper on obscenity,[116] the Commission considered whether the criminal law was an appropriate mechanism for the regulation of obscenity. The Working Paper listed the various purposes of criminal law as encompassing the following: retributivism; enforcement of morality; protection from harm; and underlining values.[117] It went on to emphasize that the criminal law is not used without extracting costs, in terms of liberty, of suffering, and of money.[118] The Commission concluded that the criminal law should be available to a certain extent for the regulation of obscenity, but that other methods, which might include zoning laws, customs regulations, and administrative and tax laws, should be used where appropriate.[119] The criminal law itself can approach this material in different ways; discussed below are the three most plausible methods.

(i) Proposed Amendment to the *Criminal Code* Provision Governing Hate Literature

One argument put forth by those in favour of regulating pornography is that pornography is a form of communication promoting hatred against women. It has thus been suggested in various forums that the law governing hate propaganda be amended to include sex as a ground on which the promotion of hatred is impermissible.[120]

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[116] Law Reform Commission of Canada, *Limits of Criminal Law*[:] *Obscenity: A Test Case* (1975) (Working Paper No. 10).

[117] *Ibid.*, at 33-38.

[118] *Ibid.*, at 40 and 49.

[119] *Ibid.*, at 47.

[120] One academic commentator expressed the parallel this way: "[B]y a curious paradox, many people who favour criminal censorship of hate literature are adamant against criminal censorship of pornography. If the brutality of pornography were racially focused: e.g. a magazine depicting white men raping a black girl, or Nazi storm troopers torturing a Jewish woman, there would undoubtedly be cries for prohibition": I.A. Hunter, "Obscenity, Pornography and Law Reform" (1975), 2 Dalhousie L.J. 482, at 496. Similarly, the Board of Inquiry in *Saskatchewan Human Rights Commission*, *infra*, note 190, at para. 17667, asked: "[W]ould there be any doubt that a violation of Section 14(1) existed if race rather than sex formed the nexus of the class against whom offending themes in the allegedly

In its 1986 Working Paper on hate propaganda,[121] the Law Reform Commission of Canada proposed that the section in the *Criminal Code*[122] governing hate literature include protection on the grounds of sex. This was done, however, without accepting the argument that pornography itself constitutes a form of promoting hatred against women. The Working Paper simply recommended that the hate propaganda law should include the following grounds as protected: "race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability".

When the Fraser Report[123] recommended that the hate propaganda section of the *Criminal Code* be expanded to include all the grounds enumerated in section 15 of the *Canadian Charter of Rights and Freedoms*,[124] it did so for very different reasons and based upon very different assumptions. That is, the Fraser Report agreed that pornography interfered with women's search for equality and that it constituted a form of promoting hatred against women. It therefore saw other changes to the provision as necessary in order to make the section effective in combatting the adverse effects of pornography. For example, the Commission recommended that the "wilfully" requirement be removed from the section, that the Attorney General's consent to a prosecution be removed, and that the offence be redefined to include any visible representation.[125]

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discriminatory material was directed?": Board of Inquiry decision, para. 17667. Compare the insight of Garry, *supra*, note 14, at 409; and M. Betzold, "How Pornography Shackles Men and Oppresses Women", in Kimmel, *supra*, note 40, 115, at 118.

121 Law Reform Commission of Canada, *Hate Propaganda* (1986) (Working Paper No. 50), at 40, Recommendation 1.

122 R.S.C. 1970, c. C-34, ss. 281.1-281.3, as en. by R.S.C. 1970 (1st Supp.), c. 11.

123 *Supra*, note 10, at 320-22.

124 *Supra*, note 21.

125 Fraser Report, *supra*, note 10, Vol. 1, at 322. Similar recommendations to the first two of these, as well as other recommendations, were also put forth in Canada, House of Commons, *Equality Now!* (Report of the Special Committee on Participation of Visible Minorities in Canadian Society) (March 1984), at 69-74. The Law Reform Commission of Canada, *supra*, note 121, at 45-47, however, was against broadening the hate propaganda sections in the ways suggested by the Fraser Committee (aside from including women as an identified group), stating that it would be preferable to craft criminal legislation that specifically targeted pornography.

A third proposal to broaden the hate propaganda section to include "sex" in the categories of identifiable groups was included in Bill C-54.[126] However none of these proposals translated into legislation, so the section as it reads today[127] omits any reference to sex.

(ii) Proposed Amendment to *Criminal Code* to Govern Pornography – Bill C-54

According to one commentator, the federal government "has been searching for ways to improve obscenity laws since the mid-1970s".[128] She supports this by noting that there had been at the time of writing (1988) over forty Bills introduced in the House of Commons in the previous twelve years.[129]

Perhaps the most well-known attempt was Bill C-54,[130] introduced by then Minister of Justice the Honourable Raymond Hnatyshyn, which had its first reading in the House on May 4, 1987 but was subsequently abandoned. The Bill sought to create new, more objective definitions of pornography and to distinguish "erotica" from "pornography"; it would have prohibited only the latter. It went on to provide for amendments to, *inter alia*, sections 138, 159-165, and 281.1(4) of the 1970 *Criminal Code*.[131]

Among the offences the Bill created were the following: dealing in pornography and child pornography, and possessing child pornography. It empowered courts to issue warrants authorizing the seizure of pornography and to order that the things seized be forfeited to the Crown on proof that they were pornography. As well, it provided that it would be an offence for a theatre owner to present a pornographic performance, for a performer to perform in a pornographic performance, and for any one to use the mails to send pornography or hate propaganda.[132]

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[126] See *infra*, this ch., sec. 4(a)(ii).

[127] The provision has been upheld as constitutional; it was found to be a reasonable limit on the free expression guarantee demonstrably justifiable in a free and democratic society: *R. v. Keegstra*, *supra*, note 38.

[128] Mahoney, *supra*, note 79, at 576.

[129] *Ibid.*, at 576, *n.* 1.

[130] *An Act to amend the Criminal Code and other Acts in consequence thereof*, 1986-87-88 (33rd Parl., 2nd Sess.).

[131] *Supra*, note 122.

[132] As noted above, Bill C-54, *supra*, note 130, also would have broadened the hate propaganda section by adding the category of "sex" to the identifiable groups.

The Bill provided for defences in certain circumstances; these included artistic merit, educational or medical purpose, and "reasonable steps". The latter provided that a person charged with child pornography offences could show that all reasonable steps were taken to ensure that no one in the material was or appeared to be under eighteen years of age.

Bill C-54 intended to replace the offences of corrupting morals, the "obscenity" and "crime comic" provisions of the *Criminal Code*, the provisions dealing with theatrical performances, and the restrictions on publication in then section 162[133] of the *Code*. However, the Bill died on the order paper.

(iii) Existing Obscenity Regulation

It was established in the *McNeil* decision that both federal and provincial jurisdictions could legislate concurrently on matters that would affect the regulation of "obscene" films.[134] In reaching this conclusion, the Court expressly pointed out that "equally, there is no constitutional reason why a prosecution cannot be brought under section 163 of the *Criminal Code* in respect of the exhibition of a film which the Board of Censors has approved as conforming to its standards of propriety".[135] The operation of the criminal law of obscenity is thus an additional vehicle through which films and videos are regulated.

A recent Supreme Court of Canada decision upheld the constitutionality of the criminal obscenity law.[136] In *Butler*, the Court unanimously determined that although the law infringed the constitutional guarantee of free expression, it constituted a reasonable limit demonstrably justifiable in a free and democratic society. For these reasons, films and videos that are approved by provincial film boards may still be subject to criminal prosecution under federal obscenity laws.[137]

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[133] Now *Criminal Code*, *supra*, note 6, s. 166.

[134] *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1 (subsequent references are to [1978] 2 S.C.R.) (hereinafter referred to as "*McNeil*"). See ch. 3, *infra*. The confusion that results from this overlap in jurisdiction is also discussed in ch. 3, *infra*.

[135] *McNeil*, *ibid.*, at 693.

[136] *Butler*, *supra*, note 7.

[137] A detailed discussion of the obscenity definition and of this method of regulation in general is found *infra*, ch. 3, sec. 2(b)(ii).

(b) Liability in Tort

Tort liability has not been used to any notable extent to combat pornography. However, it has been suggested that the existing law of torts should be used as the basis of actions against people involved in the production or distribution of pornography.[138] Three of the torts suggested are defamation, intentional infliction of emotional distress, and invasion of privacy. While such actions fall within the realm of possibility, there has been more activity in the area of nuisance law. It is this aspect of tort law that deserves our consideration here.

(i) Nuisance Regulation

Public nuisance is a specific subset of tort law; it includes offences "based on some interference with the interests of the community, or the comfort or convenience of the general public".[139] Proceedings for public nuisance can be civil or criminal[140] and are generally commenced by the Attorney General. A private citizen may commence such a proceeding only if she has been caused "special damage".[141] There have been cases in which nuisance actions have been brought based on an interference with public morals.[142] These have, however, met with limited success in Canada.

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[138] See, for example, "Violent Pornography and the First Amendment: A Dialogue" (1978-79), 8 N.Y.U. Rev. L. & Soc. Change 187, at 201. See, also, R. Colker, "Pornography and Privacy: Towards The Development Of A Group Based Theory For Sex Based Intrusions Of Privacy" (1983), 1 L. & Inequality 191; and K.A. Lahey, *Civil Remedies for the Harms of Pornography: An Analysis of Legal Remedies* (report submitted to the Ontario Women's Directorate, June 30, 1988), chs. IV to VIII and XI.

[139] W.L. Prosser and W.P. Keeton (ed. W.P. Keeton), *The Law of Torts*, 5th ed. (St. Paul, Minn.: West Publishing, 1984), at 643. See, also, A.M. Linden, *Canadian Tort Law*, 4th ed. (Toronto: Butterworths, 1988), at 495.

[140] See *Criminal Code*, *supra*, note 6, s. 180, establishing the indictable offence of committing a common nuisance.

[141] Linden, *supra*, note 139, at 497.

[142] Prostitution on the streets has been held to be a public nuisance: *Attorney General of British Columbia v. Couillard* (1984), 59 B.C.L.R. 102, 11 D.L.R. (4th) 567 (S.C.). However, a similar action commenced by private citizens was dismissed, as they could not prove they had suffered special damage: *Stein v. Gonzales* (1984), 58 B.C.L.R. 110, 14 D.L.R. (4th) 263 (S.C.). In Nova Scotia, the Court refused to allow such an action, partly because the action was really an attempt to control prostitution and not public nuisance: *Nova Scotia v. Beaver* (1985), 67 N.S.R. (2d) 281, 18 D.L.R. (4th) 286 (App. Div.) In *Bedard v. Dawson*, [1923] S.C.R. 681, [1923] 4 D.L.R. 293, the Supreme Court of Canada characterized a statute dealing with the closing down of a disorderly house as a statute providing for the suppression of a nuisance, and thus within provincial legislative competence as a matter of property and civil rights in the province. However, in *R. v. Westendorp*, [1983] 1 S.C.R. 43, 144 D.L.R. (3d) 259, the Supreme Court of Canada found a municipal by-law which provided that "[n]o person shall be or remain on a street for the purpose of prostitution" was *ultra vires*, as it encroached upon the federal criminal law power.

In several American states, statutes have been promulgated declaring the dissemination of obscene materials to be a nuisance and authorizing injunctions to be used in order to stop such dissemination. Because the First Amendment doctrine comes out strongly against prior restraints on speech[143] and requires stringent procedural safeguards to exist if such restraints are going to be imposed, much of the case law concerning these statutes focuses on whether their procedural safeguards are sufficient for the statutes to be considered constitutionally valid.[144] Although obscenity was included as "a common law nuisance, the use of nuisance doctrine as a major weapon against obscenity" was said in 1983 to be "a product mainly of the last decade".[145] One example of a nuisance statute provides that the use of premises for the commercial manufacturing, distribution, or exhibition of obscene materials constitutes a public nuisance and may be enjoined at the suit of the state or of any citizen.[146] The procedural safeguards necessary to a finding of constitutionality generally require that the burden be placed on the party wanting to censor to prove that the materials in question are obscene and that the materials have been finally judicially adjudged obscene. Any restraint prior to judicial adjudication may be only for a brief, defined period of time and only to maintain the *status quo*, and a prompt final judicial determination must be assured.[147]

Since *Freedman v. Maryland*,[148] many American courts have held nuisance statutes authorizing injunctive relief to be unconstitutional as impermissible prior restraints. Others have upheld such statutes as

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[143] In the United States, obscenity has been held to be "unprotected speech" (speech that does not fall within the ambit of the First Amendment) (*Miller v. California*, *supra*, note 80); therefore it can be restrained prior to distribution (*Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628 (1973); rehearing den. 414 U.S. 881, 94 S.Ct. 27 (1973)), but it must first be adjudged obscene (*Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495, 72 S. Ct. 777 (1952).

[144] For a more in-depth discussion, see B.K. Albaugh, "Regulation of Obscenity Through Nuisance Statutes and Injunctive Remedies—The Prior Restraint Dilemma" (1983), 19 Wake Forest L. Rev. 7.

[145] J.S. Trachtman, "Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power" (1983), 58 N.Y.U.L. Rev. 1478, at 1485.

[146] See, for example, TEX. REV. CIV. STAT. ANN. art. 4667 (Vernon Supp. 1982), held unconstitutional by the United States Supreme Court in *Vance v. Universal Amusement Co.*, 100 S. Ct. 1156, 445 U.S. 308 (1980), rehearing den. 100 S. Ct. 2177, 446 U.S. 947 (1980). Other statutes contain sections providing that an establishment where pornography has been disseminated may be shut down, referred to as "shutdown" or "padlock" provisions; such provisions have met with varying responses as to their constitutionality. See D. Rendleman, "Civilizing Pornography: The Case For An Exclusive Obscenity Nuisance Statute" (1977), 44 U. Chi. L. Rev. 509, at 551.

[147] *Freedman v. Maryland* 85 S. Ct. 734, 380 U.S. 51 (1965) (hereinafter referred to as "*Freedman*"), followed in *Vance v. Universal Amusement Co.*, *supra*, note 146.

[148] *Supra*, note 147.

permissible prior restraints, if a full adversary hearing is held before the injunction is authorized or if there is adherence to the procedures set out in *Freedman*.[149]

In the opinion of some, civil sanctions by the use of nuisance statutes are preferable to criminal sanctions. It has been suggested, for example, that "[i]n the absence of a cultural consensus, the practice of imposing criminal penalties for the distribution of pornography seems harsh and anachronistic.... Civilizing pornography through obscenity nuisance actions would temper the harshness of the cultural conflict".[150] Thus, while no such statutes have yet been enacted in Canada, it remains a potential alternative method for regulating pornography.

(c) Anti-Pornography Ordinances

An innovative method of regulation has been proposed in several American states, although the specific legislation that was ultimately passed in Indianapolis was declared unconstitutional by the District[151] and Circuit Courts,[152] decisions that were summarily affirmed without opinion by the United States Supreme Court.[153]

Similar model ordinances were proposed in Minneapolis[154] and Indianapolis;[155] in the former city, however, the measure was vetoed by the

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[149] For a discussion of this matter and reference to the case law, see Albaugh, *supra*, note 144, at 19-21.

[150] Rendleman, *supra*, note 146, at 510. The author goes on to proclaim the dangers of a dual system—one in which both civil and criminal sanctions are available. The potential for abuse in such a system are seen as too great: *ibid.*, at 514-21.

[151] *American Booksellers Association, Inc. v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984).

[152] *American Booksellers Association, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

[153] *American Booksellers Association, Inc. v. Hudnut*, 475 U.S. 1001, 106 S. Ct. 1172 (1986); rehearing den. 475 U.S. 1132, 106 St. Ct. 1664 (1986).

[154] Ordinance to amend Minneapolis, Minn., Code of Ordinances relating to Civil Rights, Title 7, c. 139 and c. 141 (1982) (passed December 30, 1983). These ordinances were based on a model anti-pornography ordinance originally developed by Andrea Dworkin and Catherine MacKinnon (herein referred to as the "Dworkin/MacKinnon ordinance"). The model is reprinted in Dworkin, *supra*, note 39.

[155] Code of Indianapolis and Marion County, Ind., c. 16, "Human Relations and Equal Opportunity", as am. by Indianapolis, Ind., City-County Gen. Ordinance No. 24 (May 1, 1984) and Gen. Ordinance No. 35 (passed June 15, 1984) (hereinafter referred to as the "Indianapolis Ordinance").

mayor.[156] The ordinance was premised on the theory that pornography as a practice is discrimination against women and that administrative and judicial remedies for discrimination are to be available to those discriminated against by pornography.[157] The ordinance's definition of pornography is detailed[158] and extensive and differs from the accepted American definition of obscenity as set out by the Supreme Court of the United States in *Miller v. California*.[159] The definition focuses on the notion of subordination.[160]

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[156] "A Court Test for Porn", *Newsweek* (August 13, 1984), at 40, cited in D. Pollard, "Regulating Violent Pornography" (1990), 43 Vanderbilt L. Rev. 125, at 148. See, also, Letter from Minneapolis Mayor D.M. Fraser to A. Rainville, President, Minneapolis City Council, and Council Members (January 5, 1984) (veto message), cited in R.D.B. Tigue, "Civil Rights and Censorship—Incompatible Bedfellows" (1985), 11 Wm. Mitchell L. Rev. 81, at 82, *n.* 5.

[157] The premise of the ordinance was stated this way by one commentator: "The ordinance rests on the premises that pornography, by silencing women, prevents them from fully participating in the political process, distorts the competition of ideas, and denies women the possibility of individual self-fulfilment": Benson, *supra*, note 92, at 160 (footnote omitted).

[158] No matter how detailed a definition is, problems of interpretation will abound. For a discussion of problems with the ordinance in this regard, see F. Small, "Pornography and Censorship", in Kimmel, *supra*, note 40, 72, at 73.

[159] *Supra*, note 80.

[160] The Indianapolis Ordinance, *supra*, note 155, §16-3(q) provided:

> (q) Pornography shall meean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
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> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
>
> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
>
> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
>
> (4) Women are presented as being penetrated by objects or animals; or
>
> (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; and
>
> (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

The ordinance further provided that the substitution of men, children, or transsexuals for women in paras. (1)-(6) shall also constitute pornography. At least one writer concerned with gay male pornography takes issue with the permitted substitution of men for women in this section; in his view, it does not recognize the distinct concerns of gay male pornography, which is very different from heterosexual pornography: Stychin, *supra*, note 100, at 11. Other writers about gay pornography, however, support the ordinance. See Stoltenberg, *supra*, note 102.

The ordinance prohibits trafficking[161] in pornography, coercing others into performing in pornographic works,[162] and forcing pornography on anyone.[163] It grants anyone who is injured by someone who has seen or read pornography a right of action against the maker or seller of that pornography. Further, it defines the "assault, physical attack, or injury of any woman, man, child, or transsexual in a way that is directly caused by specific pornography" as a prohibited practice.[164]

The District Court found that the ordinance had to be evaluated as speech, not action,[165] and that the ordinance regulated speech beyond unprotected obscenity.[166] As well, it was unconstitutionally vague[167] and an impermissible prior restraint as it did not comply with the procedural safeguards required for prior restraints.[168] The appeal court held that the "ordinance discriminates on the ground of the content of the speech"[169] and that the ordinance wrongly omits "any reference to literary, artistic, political, or scientific value".[170] The appeal court did not express an opinion on the lower court's view that the ordinance is impermissibly vague and that it establishes a prior restraint.[171] The statute failed because it was "not neutral with respect to viewpoint"[172] and it did not fall within the obscenity exception; the entire ordinance failed in spite of the fact that certain portions of the ordinance may have been constitutional.[173]

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[161] In the Indianapolis Ordinance, *supra*, note 155, "trafficking" was defined as the "production, sale, exhibition, or distribution of pornography" (§16-3(g)(4)), and contains certain exclusions for public or educational libraries.

[162] Defined in §16-3(g)(5) of the Indianapolis Ordinance, *ibid.*, as "[c]oercing, intimidating or fraudulently inducing any person...into performing for pornography...".

[163] Defined in the Indianapolis Ordinance, *ibid.*, as the "forcing of pornography on any woman, man, child, or transsexual in any place of employment, in education, in a home, or in any public place" (§16-3(g)(6)).

[164] *Ibid.*, §16-3(g)(7).

[165] *American Booksellers Association, Inc. v. Hudnut*, *supra*, note 151, at 1326 and 1330.

[166] *Ibid.*, at 1326 and 1331.

[167] *Ibid.*, at 1326 and 1339.

[168] *Ibid.*, at 1326-7 and 1341.

[169] *Supra*, note 152, *per* Easterbrook J., at 325. Easterbrook J. went so far as to say: "[T]his is thought control": *ibid.*, at 328.

[170] *Ibid.*, at 331.

[171] *Ibid.*, at 332.

[172] *Ibid.*, at 332.

[173] *Ibid.*, at 334.

Some commentators support the existence of this kind of ordinance, even if they find problems with the specific legislation proposed;[174] some suggest that refinements would have to be made in order for the legislation to be constitutional.[175] Because much of American First Amendment jurisprudence centres on creating categories of exceptions to constitutionally protected speech, much of the literature focuses on analogizing this kind of speech to previous exceptions.[176] Thus, it has been suggested that this type of statute is analogous to group defamation,[177] held to be unprotected by the First Amendment in *Beauharnais v. People of the State of Illinois*,[178] and to child pornography,[179] held unprotected in *New York v. Ferber*.[180] Others argue that the obscenity exception is wide enough to permit this sort of ordinance, properly drafted, to be upheld.[181] There is also an exception of incitement of illegal activity that may be used.[182] For some, the question is, since some speech is held to be unprotected due to competing rights or lack

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[174] Pollard, *supra*, note 156; M. Karo and M. McBrian, "The Lessons of *Miller* and *Hudnut*: On Proposing a Pornography Ordinance That Passes Constitutional Muster" (1989), 23 U. Mich. J.L. Reform 179; Gershel, *supra*, note 40; and Spaulding, *supra*, note 72. One reason for preferring this kind of method is that it is not viewed as a prior restraint on speech. Of course, the counter-argument is that it will have a "chilling effect" and cause speakers to censor themselves before saying anything. See, also, Brest and Vandenberg, *supra*, note 42, at 659. It was pointed out that if the provision does impose a prior restraint, a full, fair, and speedy hearing must first be given: see Karo and McBrian, *supra*, at 211. See, also, *supra*, note 147 and accompanying text. Karo and McBrian suggest that advance rulings be made available: *ibid.* Another reason for preferring this method is that "[i]n so far as such an approach does not invoke the criminal law remedy it does not call on the coercive power of the state": see Devlin, *supra*, note 80, at 204.

[175] Others support alternative proposals based on information that came out through the evolution of these ordinances. See, for example, R. Colker, "Legislative remedies for Unauthorized Sexual Portrayals: A Proposal" (1984-85), 20 New Eng. L. Rev. 687, at 700 *et seq*. Even some of those against the ordinance often praise the "initial insights of the feminist critique of pornography" as "important": V. Burstyn, "Beyond Despair: Positive Strategies", in *Women Against Censorship*, *supra*, note 36, 152, at 157.

[176] See, for example, Wesson, *supra*, note 77, at 924.

[177] Karo and McBrian, *supra*, note 174, at 197. See, also, Spaulding, *supra*, note 72, at 133, and Gershel, *supra*, note 40, at 66 *et seq*.

[178] 343 U.S. 250, 72 S. Ct. 725 (1952); rehearing den. 343 U.S. 988, 72 S. Ct. 1070 (1952). However, others have noted that "support for the *Beauharnais* decision has been substantially eroded": Tigue, *supra*, note 156, at 109.

[179] Karo and McBrian, *supra*, note 174, at 198, and Gershel, *supra*, note 40, at 70.

[180] *Supra*, note 92.

[181] See Pollard, *supra*, note 156, at 138. However, opposing arguments note that obscenity and pornography regulation address completely separate state interests; the former deals with regulating the social and moral order, while the latter aims to prevent harm and subordination: Gershel, *supra*, note 40, at 65-66. See, also, Benson, *supra*, note 92, at 156-57, for the view that the two are conceptually distinct.

[182] See Pollard, *supra*, note 156, at 139, and Gershel, *supra*, note 40, at 68-70.

of redeeming social value, "why isn't equality a sufficiently strong interest to justify the abridgement of certain kinds of speech".[183]

The issue of statutory civil causes of action in the United States is far from closed. The leading proposal now is a federal Bill introduced on July 22, 1991, entitled the Pornography Victims Compensation Act of 1991.[184] The Bill is based on the "tradition of Anglo-American jurisprudence that victims should be made whole by the ability to recover damages for the harm caused them attributable to the misconduct of others".[185] It provides a victim of a sexual crime with a cause of action against "a commercial producer, commercial distributor, commercial exhibitor, or seller of obscene material or child pornography".[186] The burden of proof falls on the person bringing the action; the plaintiff must prove, *inter alia*, that she has been the victim of a sexual crime, that the material is obscene or is child pornography, that the material was "a substantial cause of the offense", and that the defendant should have reasonably foreseen that such material would create an unreasonable risk of such a crime.[187] The section that governs admissible evidence provides that "the testimony of the offender shall not be considered".[188] Damages available are actual damages including compensation for pain and suffering, as well as attorney's fees and other reasonable costs of the suit.[189] The Bill is currently pending; it is under the consideration of the Senate Judiciary Committee.

(d) Human Rights Violations

There are those who favour treating pornographic material as violations of provisions in human rights legislation. This method has met with limited success. The most well-known example[190] arose in a Saskatchewan case, in which a complaint was filed against the University of Saskatchewan Engineering Students' Society and certain of its students, alleging that two

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[183] Spaulding, *supra*, note 72, at 136. Similarly, it has been noted that the "state has an interest in eliminating and preventing the harm caused by pornography. In light of the subordinate status of women, that state interest is compelling": Gershel, *supra*, note 40, at 60-61.

[184] S. 1521, 102 Cong., 1st Sess. (1991).

[185] *Ibid.*, §2(a)(1).

[186] *Ibid.*, §3(a).

[187] *Ibid.*, §3(b).

[188] *Ibid.*, §3(c).

[189] *Ibid.*, §3(d).

[190] *Saskatchewan Human Rights Commission v. Waldo* (1984), 5 C.H.R.R. D/2074 (Sask. Bd. of Inquiry); rev'd. *infra*, note 195 (Sask. Q.B.); aff'd. *infra*, note 198 (Sask. C.A.); leave to appeal to S.C.C. refused, *infra*, note 202 (hereinafter referred to as "*Saskatchewan Human Rights Commission*"). For a discussion of this case, see Lahey, *supra*, note 86, at 677 *et seq.*

issues of a newspaper they published violated section 14(1) of *The Saskatchewan Human Rights Code*.[191] Section 14 provided as follows:[192]

> 14.—(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper,through a television or radio broadcasting station or any other broadcasting device or in any printed matter or publication or by means of any other medium that he owns, controls, distributes or sells, any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons of any right to which he is or they are entitled under the law, or which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of, any person, any class of persons or a group of persons because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin.
>
> (2) Nothing in subsection (1) restricts the right to freedom of speech under the law upon any subject.

In its decision, the Saskatchewan Board of Inquiry noted that limitations on freedom of expression are often permitted in our society where broader goals, which include but are not limited to equality, are of overriding importance. The Board found the analogy between racial discrimination, which is regulated by hate literature provisions, and sex discrimination to be very close. The publications in question in front of the Board contained many cartoons, articles, and exhortations to action that can only be described as misogynist.[193] The Board's conclusions on the matter were set out in very strong language, a portion of which is excerpted here:[194]

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[191] S.S. 1979, c. S-24.1. Mahoney, *supra*, note 11, at 103, points out that a similar approach was taken in *The Black United Front of N.S. v. Bramhill* (1980), 2 C.H.R.R. D/249 (N.S. Bd. of Inquiry), a case where racial depictions on a badge were found to offend the Nova Scotia Human Rights legislation. The Chair said (at 252): "In particular cases, the right of free speech may have to give way to other human rights, such as the right not to be discriminated against." An Ontario board, referring to the decision at the Board stage in Saskatchewan, stated: "In my opinion, such a complaint could have been initiated in Ontario by an individual in respect of women as a class, given subsections 15(1) and (2) of the *Code*": *Tabar v. Scott* (1985), 6 C.H.R.R. D/2471, at para. 20559 (Ont. Bd. of Inquiry); rev'd in part *sub nom Re West End Construction Ltd. and Ministry of Labour for Ontario* (1986), 57 O.R. (2d) 391 (Div. Ct.), rev'd in part (1989), 70 O.R. (2d) 133, 62 D.L.R. (4th) 329 (C.A.).

[192] Note that this provision goes beyond discrimination and addresses material that exposes persons or classes or groups of persons to hatred, ridicules them, or otherwise affronts their dignity. See Mahoney, *supra*, note 11, at 102. Attempts made to apply these provincial provisions to hate propaganda have been foreclosed by the courts. See *R. v. Keegstra*, *supra*, note 38 (*per* McLachlin J., dissenting).

[193] Descriptions are given in the course of the Board of Inquiry's judgment: see *Saskatchewan Human Rights Commission*, *supra*, note 190.

[194] *Ibid.*, at paras. 17722 and 17723 (Bd. of Inquiry).

> 17722. A stereotypical image of a certain protected class of persons, namely women, is presented when they are consistently depreciated as ridiculous objects and when sexual violence and other forms of discriminatory depictions and descriptions are directed at them because of their sex. The class consisting of this gender is then ridiculed, and belittled and their dignity affronted. Discrimination like this jeopardizes their opportunity to obtain equality rights including employment, education and security of their persons on an equal footing with the dominant gender grouping.
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> 17723. The effect of such representations is to reinforce and legitimate prejudice against women. It prolongs the existence of hangovers of prejudice against equal female participation in education, work, aspects of social life and the professions.

The Board thus concluded that there was a violation of the *Code*, that certain of the respondents published, controlled, or distributed the offending newspapers, and that these violations were not protected as freedom of expression. The Board ordered: (1) that there be no further dissemination of the two editions in question; (2) that the respondents publish a substantial number of copies of the Board's order in full and without comments to be disseminated across the campus; (3) that all members of the publication's staff and the Engineering Students' Society's (one of the respondents) executive for the then current and following year attend workshops arranged by the Saskatchewan Human Rights Commission; and (4) that the liable respondents pay certain costs.

The Board's decision was appealed to the Saskatchewan Court of Queen's Bench.[195] There were several grounds of appeal, including the following: section 14(1) of *The Saskatchewan Human Rights Code* violates the freedom of expression guarantee enshrined in section 2(*b*) of the *Canadian Charter of Rights and Freedoms*;[196] the Board failed to consider whether the impugned material fell within the terms "notice, sign, symbol, emblem or other representation"; the Board erred in allowing the complaint against the Society, which could not have been found to be a person under section 14(1); and the Board interpreted section 14(1) in a manner that renders it *ultra vires* the province as being criminal law.

The Court of Queen's Bench concluded that unless there was evidence before the Board that the representations in question "enhanced discrimination" against women in Saskatchewan, its application of section 14(1) would be beyond the power of the province as being criminal law. Milliken J. went on to hold that because the Board had considered the broad objects of *The Saskatchewan Human Rights Code* as set out in

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[195] (1986), 7 C.H.R.R. D/3443 *sub nom. Hoffer v. Havemann* (Sask. Q.B.).

[196] *Supra*, note 21.

section 3 to be part of the rights granted to women, the Board did not deal solely with the question of whether the material at issue enhanced discrimination against women in the ways prohibited by the *Code*. It thus erred in law. The Board further erred by not determining whether the material fell within the terms "notice, sign, symbol, emblem or other representation" used in section 14(1) and by assuming that all material was covered by that section.[197] The Court also held that the Board erred in other, more technical ways. The Court did not deal with the *Charter* issue, as the two impugned editions of the paper were published before the *Charter* came into effect. The Court thus allowed the appeal and quashed the order of the Board.

This decision was appealed to the Saskatchewan Court of Appeal.[198] The majority of that Court stated at the outset: "That the impugned content of the two editions constitutes an affront to the dignity of women is clear, but whether its publication in whole or in part offends s. 14 of the Code is a difficult matter."[199] The majority went on to note that the central dilemma was that the "purpose of the Act pulls in one direction, the cast of the section in another".[200] Because of the wording of the section, newspaper articles did not fall among the categories of representation covered. While the Board did not accord the provision a meaning that would be *ultra vires* the province, it did err by importing the word "articles" into section 14. The appeal was therefore dismissed. Vancise J.A. dissented, concluding that newspaper articles are covered by the section, that the section is *intra vires* the province, that it does not run into paramountcy problems with the *Criminal Code*,[201] and that the Engineering Students' Society is a person for the purposes of the Act. He would have allowed the appeal. Leave to appeal the decision to the Supreme Court of Canada was refused.[202]

The human rights method thus remains a conceivable one for regulating this kind of material, even if certain specific provisions may require revision in order to achieve their full desired effect. The method is appealing because

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[197] In so deciding, Milliken J. referred to the Manitoba case of *Warren v. Chapman*, (1984), 29 Man. R. (2d) 172, [1984] 5 W.W.R. 454 (Q.B.), aff'd (1985), 31 Man. R. (2d) 231, [1985] 4 W.W.R. 75 (C.A.) (relying on words of Philp J.A. at [1985] 4 W.W.R. 80), that interpreted similar wording and decided that newspapers articles or editorials were not covered by the terms of the section.

[198] *Sub nom. Saskatchewan (Human Rights Commission) v. Engineering Students' Society* (1989), 10 C.H.R.R. D/5636, 56 D.L.R. (4th) 604 (Sask. C.A.) (subsequent references are to 56 D.L.R. (4th)).

[199] *Ibid.*, at 608.

[200] *Ibid.*, at 623.

[201] *Supra*, note 122.

[202] [1989] 1 S.C.R. xiv, 57 D.L.R. (4th) viii.

it treats the issue as one of sex discrimination while avoiding the problems of prior restraint. However, many people will consider a serious drawback to be the fact that the potential scope of application of the provisions, given the images so prevalent in our society, may be very broad.

(e) Customs

Because such a large percentage of pornographic material in Canada is manufactured outside of the country,[203] the legislation governing importation of such material plays a significant role in its overall regulation. Customs legislation is of direct significance to film boards as it is customs officials who are the first to encounter material on its way into the country. Thus, Customs has responsibility for clearing material into the country before the provincial boards get a chance to review, classify and, where applicable, alter the films.[204]

Central to the role of Canada Customs in this regard is code 9956 of Schedule VII to the *Customs Tariff*.[205] Part III of the *Customs Tariff* consists of one section, which provides as follows:

> 114. The importation into Canada of any goods enumerated or referred to in Schedule VII is prohibited.

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[203] In 1986, it was written that "97% of all pornography does enter Canadian markets through importation rather than through domestic production": K. Lahey, *Free Trade and Pornography*[:] *A Discussion Paper*, written for METRAC (November, 1986), at 60. The same figure was given in 1989 by Cole, *supra*, note 80, at 84.

[204] Because both processes are prerequisites to the public availability of films—that is, the film must pass through Customs and must be approved and classified by the provincial film board—there "developed a long standing practice of co-operation between Customs and the provincial classifiers": Fraser Report, *supra*, note 10, Vol. 1, at 156. In Ontario, no agreement between Customs and the Ontario Film Review Board exists; in the late 1980s there had been a draft agreement, but it went no farther than a draft, and was never signed: Conversation with R. Payne, Chair of the Ontario Film Review Board (June 2, 1992).

[205] R.S.C. 1985, c. 41 (3rd Supp.), Sched. VII, as am. by R.S.C. 1985, c. 18 (4th Supp.), s. 1, S.C. 1989, c. 18, s. 25. The constitutionality of the *Customs Tariff* was upheld by the Federal Court Trial Division, but on appeal, it was held that the words "immoral and indecent" in s. 14, which were nowhere defined in the legislation, were so vague that they did not constitute a "reasonable limit prescribed by law" for the purposes of *Charter* s. 1: *Luscher v. Deputy Minister, National Revenue, Canada, Customs and Excise*, [1985] 1 F.C. 85, 17 D.L.R. (4th) 503 (C.A.). Parliament then redefined prohibited material in emergency legislation passed within a matter of days, so that the definition relies on the obscenity provision of the *Criminal Code*: *An Act to amend the Customs Tariff*, R.S.C. 1985, c. 21 (1st Supp.).

Schedule VII is entitled "Prohibited Goods"; code 9956 is found in that schedule, and includes the following:[206]

> 9956. Books, printed paper, drawings, paintings, prints, photographs or representations of any kind that
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> (*a*) are deemed to be obscene under subsection 163(8) of the *Criminal Code*;
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> (*b*) constitute hate propaganda within the meaning of subsection 320(8) of the *Criminal Code*;
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> . . .

Customs and Excise has issued guidelines for the interpretation to be given to this provision.[207] The guidelines set out quite specifically the goods that "in so far as they are deemed to be obscene or hate propaganda within the meanings of the terms as set forth above, are to be classified under tariff code 9956 and their importation into Canada prohibited".[208] It is expressly "emphasized that a book, film, video cassette, etc., is to be assessed in its entirety".[209] Particular exemptions are also specified; these include "goods which communicate in a rational and unsensational manner information about a sexual activity that is not unlawful"[210] and "sex aids and sex toys".[211]

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[206] Incidents involving temporary hold-ups at the border of a film entitled "Nelson Mandela" and Salman Rushdie's novel, *Satanic Verses* (1988) have occurred under *Customs Tariff*, *supra*, note 205, s. 114 and Sched. VII, code 9956(*b*). See *R. v. Keegstra*, *supra*, note 38, at 783.

[207] Revenue Canada, Interpretative Policy and Procedures for the Administration of Tariff Code 9956 (memorandum), containing "Guidelines and General Information" (hereinafter referred to as "Guidelines").

[208] *Ibid.*, s. 6. Section 5 reiterates the *Criminal Code* obscenity definition; ss. 6(a)(1) to (8), 6(b), 6(c), 6(d), and 6(e) give specific examples of materials that are to be classified under the tariff code and their importation into Canada prohibited as they are obscene within the meaning set out.

[209] Guidelines, *supra*, note 207, s. 8.

[210] *Ibid.*, s. 9(c). Sexual activities that are currently unlawful under the *Criminal Code*, *supra*, note 6, include: sexual interference with a person under fourteen years of age (s. 151, as am. by R.S.C. 1985, c. 19 (3rd Supp.), s. 1); invitation to sexual touching with a person under fourteen years of age (s. 152, as am. *ibid.*, s. 1); sexual exploitation of a young person (s. 153, as am. *ibid.*, s. 1); incest (s. 155, as am. R.S.C. 1985, c. 27 (1st Supp.), s. 21); anal intercourse, unless it is engaged in in private between consenting adults (s. 159, as am. R.S.C. 1985, c. 19 (3rd Supp.), s. 3); bestiality (s. 160, as am. *ibid.*, s. 3); and sexual assault (s. 271, as am. *ibid.*, s. 10, ss. 272-73).

[211] Guidelines, *supra*, note 207, s. 9(d).

One criticism of customs regulation is that it gives too much discretion to individual Customs officers. This is particularly evident in situations in which the same material is treated differently at different border crossings.[212]

(f) Taxation

One method that is sometimes used to regulate the production or consumption of specific goods is the imposition of a tax. The broad term "excise tax" has been defined as "[a] tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege.... Tax laid on manufacture, sale, or consumption of commodities or upon licenses to pursue certain occupations or upon corporate privileges. In current usage the term has been extended to include various license fees and practically every internal revenue tax except the income tax"[213] and is often used in a way that includes those taxes commonly referred to as "sin" and "luxury" taxes. Such tariffs may be imposed "to achieve a desired social or political goal, or simply in order to raise revenue".[214] The products that are most often referred to as appropriate objects of these taxes include alcohol, gasoline, and tobacco.[215] One reason for taxing these types of goods is that the products themselves are seen to create social costs.[216] However, the taxes also exist in other versions, such as highway tolls, airline excise taxes, goods and services taxes, and energy consumption taxes. It is sometimes specified that the revenue collected through these charges is to be used for a purpose connected with the product itself: the revenue from airline excise taxes may be used to improve the safety of the airline industry;[217] highway tolls are meant to be reinvested in the roads;[218] revenue from alcohol excise taxes

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[212] See Lahey, *supra*, note 203, at 62.

[213] *Black's Law Dictionary*, 5th ed. (St. Paul, Minn.: West Publishing, 1979).

[214] P.A. Metzer, "Consumption-Based Taxation" (1985), 29 Boston B.J. 18, at 21.

[215] See, for example, the *Excise Act*, R.S.C. 1985, c. E-14; the *Gasoline Tax Act*, R.S.O. 1990, c. G.5; and the *Tobacco Tax Act*, R.S.O. 1990, c. T.10.

[216] See J. Teuber, "Evidence Mounts Against Using Excise Taxes for Deficit Reduction" (1987), 35 Tax Notes 822, at 823, and A. Lodge, "Sinful Luxuries—Always Fair Game" (1987), 164 J. Accountancy 176. Ture asks the question whether social policy should be concerned with issues such as smoking and the consumption of alcoholic beverages, and takes issue with the theory that these activities impose costs on others. In his view, this theory is too crude, for it is only certain subgroups of the taxed groups that impose these costs. Further, it would be all of society and not just the taxed individuals who would benefit from the revenue produced from the taxes, especially if the money went to reduce the deficit: N.B. Ture, "Social Policy and Excise Taxes" (1988), 40 Tax Notes 737, at 737-39.

[217] See Teuber, *supra*, note 216, at 824-25.

[218] Metzer, *supra*, note 214, at 21.

are intended to be used to offset the costs of socially undesirable effects of alcohol. Sometimes, the revenue generated by the taxes is used for a broader purpose such as deficit reduction.[219] The imposition of such a tax is often intended to promote a decrease in production and consumption levels of a certain product.[220]

Taxes may be imposed at various point along the chain of production, distribution, and consumption. Those taxes that fall solely on the consumer are highly regressive.[221] That is, they are generally not graduated according to the income level of the individual consumer or user, so people of lower incomes are affected more severely by these charges than are people in higher income brackets.[222] Further criticisms of these kinds of taxes have been expressed. For example, excise taxes in general are said to affect the economy negatively by increasing unemployment[223] and decreasing production efficiency.[224] Excise taxes are often favoured by politicians as they are easy to impose and increase, and can often be hidden from the consumers.[225]

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219 H.D. Garber, "The Role of Consumption Taxes in Tax Reform Around the World" (1988), 41 National Tax J. 357, at 363.

220 Ture, *supra*, note 216, at 738. However, "[t]he hypocrisy of pretending to suppress a supposedly undesirable product while depending heavily on revenues from it was epitomized by British King James I, who said 'whiffing'— using tobacco— was such a vile and stinking custom that he found it necessary to increase the tobacco tax by 4,000 percent. And to further control the 'barbarous and beastly' practice, he established a state monopoly, requiring tobacco and pipe merchants to pay an annual fee for their warrants, or licenses. You might say he hated tobacco all the way to the exchequer": Lodge, *supra*, note 216.

221 M.F. Johnson and J. Thorndike, "Opposition to Excise Tax Increases Focus of Finance and Ways and Means Hearings" (1987), 36 Tax Notes 240, at 241; Teuber, *supra*, note 216; and K.D. Simonson, "The Dubious Virtue of Higher 'Sin' Taxes" (1990), 49 Tax Notes 99, at 100, 102. See, also, K.D. Simonson, "The Inequity of Iniquity Taxes" (1989), 45 Tax Notes 1367, and Lodge, *supra* note 216.

222 Moreover, "consumption taxes that differ in their inclusion of different commodities create differences in burdens among individuals according to their taste for the goods that are relatively heavily taxed. A nonsmoker, I find the burden of the tax on tobacco quite bearable, but I would welcome relief from the tax on wine": D. Bradford, "What are Consumption Taxes and Who Pays them?" (1988), 39 Tax Notes 383, at 390.

223 This is a particularly important criticism for those regions that produce goods often subject to these taxes, such as tobacco, gasoline and alcohol: Johnson and Thorndike, *supra*, note 221, at 240-41.

224 Ture, *supra*, note 216, at 738.

225 Teuber, *supra*, note 216, at 823. The fact that these taxes are hidden is another reason for which Ture has criticized them: "Any tax increase should have the broadest possible reach in the population, and its burden should be clearly identifiable by those paying the additional taxes. Taxes that are paid only by some of us or are hidden from us cannot effectively perform the basic function of taxes—to price out government services and activities. These considerations, along with their distortionary economic effects, should rule out any and all excise increases": Ture, *supra*, note 216, at 740.

The imposition of an excise or consumption tax on adult sex videos and films is an interesting idea that would raise several challenges of its own in addition to the usual concerns described above. For instance, the identification of a film or video as an "adult sex film" would become much more contentious, and an increase in the number of times Board classification decisions are judicially reviewed would likely ensue. Decisions would have to be made as to what material would be targeted. While problems of definition similar to those which arise in the censorship context would occur, the problems of inexact definitions and the concomitant possibility for overbreadth in the material captured by the definitions would result only in the imposition of a financial levy, a burden less harsh than prior restraint or criminal prosecution. If specifically designated, revenue raised by these taxes could be used to promote the availability of corrective information about sexuality, information that is currently largely unavailable, and the institution and development of media literacy programmes.

(g) Industry Self-Regulation

In the United States, "the Adult Film Association of America (AFAA) ...represents two hundred of the producers, distributors, and exhibitors of sexually explicit film and videotape cassettes."[226] The AFAA's guidelines provide that only adults are to be admitted to films; that the films will comply with First Amendment requirements; that child pornography will not be condoned; and that the privacy of the public will be respected in terms of advertising and public displays.[227] This is a voluntary association with no enforcement mechanisms; however, it should be viewed as one among many options for the regulation of pornographic material.

(h) Other Methods

Two other federal modes of regulation focus on content regulation in broadcasting[228] and on use of the mail system.[229]

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[226] Hawkins, *supra*, note 17, at 207.

[227] In Hawkins, *ibid.*, at 208, it is noted that there are currently no enforcement mechanisms for the Association.

[228] See *Broadcasting Act*, S.C. 1991, c. 11, s. 3; *Radio Regulations*, 1986, SOR/86-982, and *Television Broadcasting Regulations*, 1987, SOR/87-49.

[229] See the *Canada Post Corporation Act*, R.S.C. 1985, c. C-10, ss. 43(1), 54, 41(1). Compare s. 168 of the *Criminal Code*, *supra*, note 6, which establishes an offence of using "the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous..." .

In addition to the federal and provincial levels of regulation in this country, there are also municipal efforts and international agreements that affect this kind of material. For example, section 225 of the *Municipal Act*[230] allows all councils of the municipality to pass by-laws "licensing, regulating, governing, classifying and inspecting adult entertainment parlours...". By-laws concerning such parlours and other similar activities have had varying success when challenged in court for assorted reasons.[231]

International obligations exist as well. Canada is signatory to an international Convention for the Suppression of the Circulation of and Traffic in Obscene Publications[232] in which contracting parties agree, *inter alia*, that trading, distributing, publicly exhibiting, and importing or exporting obscene materials is an offence.[233] Similarly, the Agreement for the

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[230] R.S.O. 1990, c. M.45.

[231] *Re Sharlmark Hotels Ltd. and Municipality of Metropolitan Toronto* (1981), 32 O.R. (2d) 129, 121 D.L.R. (3d) 415 (Ont. Div. Ct.), found Toronto's by-laws concerning adult entertainment parlours to be *intra vires* as regulatory, not criminal. The Supreme Court of Canada considered a similar New Brunswick provision in *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, 44 D.L.R. (4th) 663. In that case, it was a provision in the *Liquor Control Act*, R.S.N.B. 1973, c. L-10, that allowed the Liquor Board to prohibit specific types of live entertainment in licensed premises. Nude entertainment was prohibited in the particular case. The Supreme Court of Canada held the legislation to be *intra vires* the province as related to property and civil rights and to matters of a purely local nature, in spite of the fact that similar provisions could be found in the *Criminal Code*, *supra*, note 122. Ontario courts have reached different conclusions: in *Re Koumoudouros and Municipality of Metropolitan Toronto* (1985), 52 O.R. (2d) 442, 24 D.L.R. (4th) 638 (C.A.); leave to appeal to S.C.C. refused (1986), 53 O.R. (2d) 665*n*, 24 D.L.R. (4th) 638*n* (S.C.C.), the Court of Appeal held Toronto's G-string by-law requiring that dancers have an opaque covering over their pubic area to be *ultra vires* as regulating public morals, and therefore properly within the federal criminal law power; see, also, *Re Nordee Investments Ltd. and City of Burlington* (1984), 48 O.R. (2d) 123, 13 D.L.R. (4th) 37 (C.A.); leave to appeal to S.C.C. refused (1985), 58 N.R. 237, 9 O.A.C. 79 (S.C.C.), which struck down a by-law attempting to regulate nudity in eating establishments—not only adult entertainment parlours—as criminal, and hence *ultra vires* the municipality. The Court of Appeal in *Re Hamilton Independent Variety & Confectionary Stores Inc. and City of Hamilton* (1983), 143 D.L.R. (3d) 498, 4 C.R.R. 230 (Ont. C.A.), struck down a by-law aimed at controlling the display of adult reading materials as void for uncertainty. The terms "appealing or designed to appeal to sexual appetites or inclinations" was too vague for a retailer to know whether he required a licence under the by-law. In *Re Information Retailers Association of Metropolitan Toronto Inc. and Municipality of Metropolitan Toronto* (1985), 52 O.R. (2d) 449, 22 D.L.R. (4th) 161, the Court of Appeal held s. 222 of the *Municipal Act*, R.S.O. 1980, c. 302, to be *intra vires*, but struck down a by-law made pursuant thereto regulating the sale and display of adult books and magazines as void for uncertainty; however, in *Re City of Oshawa and 505191 Ontario Ltd.* (1986), 54 O.R. (2d) 632, 14 O.A.C. 217, the Court of Appeal upheld a by-law enacted pursuant to s. 222 of the *Municipal Act*, *supra*, that geographically restricted the operation of adult entertainment parlours.

[232] Geneva (September 12, 1923), as am. by the Protocol signed at Lake Success, N.Y. (November 12, 1947), Can. T.S. 1951, No. 33. Canada signed the Protocol on November 24, 1947.

[233] *Ibid.*, Article 1.

Suppression of the Circulation of Obscene Publications[234] provides in part that all contracting powers undertake to establish an authority to centralize information that may help trace acts constituting infringements of municipal laws concerning obscenity, and supply information regarding the importation of such materials and facilitating their seizure.[235]

5. CONCLUSIONS

It is evident that there is no shortage of methods available for regulating materials that are determined by society to be undesirable. Most of these methods do not rely on prior restraint, but regulate the time, place, and manner of displays or provide for recourse after the fact. The importance of this section is not to evaluate the various methods mentioned, but to situate the mandate of the Ontario Film Review Board within the context of the myriad of possible regulatory initiatives. In this way, we should be better able to assess the appropriateness and effectiveness of the mechanisms of film censorship and classification as only two of a vast number of potential techniques for the regulation of pornographic materials. The existence of various *types* of regulatory initiatives that range from prior restraint and criminal prosecution, through civil causes of action, to zoning and tax initiatives, provides important background information for the evaluation of the powers of the Board that will take place in chapter 4 of this Report.

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[234] Paris (May 4, 1910), as am. by the Protocol signed at Lake Success, N.Y. (May 4, 1949), Can. T.S. 1951, No. 34.

[235] Articles 1.1 and 1.2. Canada is also a signatory to the Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific, and Cultural Character (known as the "*Beirut Agreement*"), adopted by the General Conference of Unesco at Beirut, 1948, 17 U.S.T. 1578, T.I.A.S. No. 6116, 197 U.N.T.S. 3. The Agreement came into force on August 12, 1954.

CHAPTER 3

PUBLIC LAW ANALYSIS

1. INTRODUCTION

A discussion of the Ontario Film Review Board requires an analysis of public law issues raised in the fields of both constitutional and administrative law. In the domain of constitutional law, issues arise in the context of both the division of powers and the *Canadian Charter of Rights and Freedoms*.[1] In terms of administrative law, relevant issues include the availability of judicial review, the procedural requirements of the Board, and the proper exercise of discretion. There is also an overlap of administrative law and the *Charter* that requires some discussion.

We now turn to an examination of these issues.

2. THE CONSTITUTION

(a) Division of Powers

Regulation of film and video classification and approval is an extremely difficult legislative task; it is rendered even more complicated in this country by the division of powers between federal and provincial governments. Both levels of government have authority to pass legislation that will affect the regulation of film. At the federal level, there currently exists legislation in many forms,[2] the most significant of which are criminal obscenity laws[3] and customs legislation.[4] At the provincial level, the most important method of regulation is found in the provincial film review boards. The duplication and

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[1] Being Part I of the Constitution Act, 1982, which is Schedule B of the Canada Act 1982, c. 11 (U.K.) (hereinafter referred to as the "*Charter*").

[2] See, *supra*, ch. 2, sec. 4.

[3] Based on the federal criminal law power in s. 91(27) of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).

[4] Based on the federal power over the "Regulation of Trade and Commerce" in s. 91(2) of the *Constitution Act, 1867, ibid.*, and on s. 91(3), the power over the "raising of Money by any Mode or System of Taxation".

interaction of these various methods of legal control is a subject of widespread concern.[5]

Since 1978, it has been clear that the power to regulate the exhibition, sale, and exchange of films is *intra vires* the legislative authority of the provinces. The case that decided this was *The Nova Scotia Board of Censors v. McNeil*,[6] in which the Amusements Regulation Board of Nova Scotia (previously the Nova Scotia Board of Censors), acting pursuant to its powers under the provincial *Theatres and Amusements Act*[7] and its regulations, had prevented the film "Last Tango in Paris" from being distributed in the theatres of Nova Scotia. Because the case arose before the promulgation of the *Charter*, there was no challenge to the legislation on grounds of infringement of a constitutionally protected freedom of expression, although it was "alleged that the legislation constitutes an invasion of fundamental freedoms".[8]

(i) The *McNeil* Decision

The Nova Scotia Court of Appeal[9] had struck down the impugned legislation, holding that it was concerned with morality and as such invaded the criminal law field reserved to the federal Parliament in section 91(27) of the *Constitution Act, 1867*.[10] However the Supreme Court of Canada, in a decision that saw the Court split five to four, allowed the appeal. The majority agreed with the appellate court that the film had been prohibited on moral grounds, but was of the view that "the Board is clothed with authority to fix its own local standards of morality in deciding whether a film is to be rejected or not for local viewing".[11]

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5 See *infra*, this ch., sec. 2(c). Note that municipal governments also exert some control: see *supra*, ch. 2, note 231.

6 [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1 (subsequent references are to [1978] 2 S.C.R.) (hereinafter referred to as "*McNeil*").

7 R.S.N.S. 1967, c. 304.

8 *McNeil*, *supra*, note 6, at 687. In fact, MacDonald J.A. of the Court of Appeal, reported *sub nom. McNeil v. Attorney General of Nova Scotia* (1976), 14 N.S.R. (2d) 225, 78 D.L.R. (3d) 46 (S.C. App. Div.), agreed that the legislation was potentially offensive as an illegal intrusion on fundamental freedoms. The majority of the Supreme Court, however, expressly rejected this finding, having regard to the presumption of constitutional validity. See *infra*, note 20 and accompanying text. The dissent did not consider the issue, given its conclusion that the legislation was *ultra vires*. See *infra*, note 24 and accompanying text.

9 *Ibid.*

10 *Supra*, note 3.

11 *McNeil*, *supra*, note 6, at 690-91.

The provincial legislation differed from the federal *Criminal Code*[12] in two respects. First, the provincial legislation "is not concerned with creating a criminal offence or providing for its punishment, but rather in so regulating a business within the Province as to prevent the exhibition in its theatres of performances which do not comply with the standards of propriety established by the Board".[13] Thus, it is with the valid provincial purpose of regulation of a business and not the punishment of a crime that the provincial legislation is concerned. Second, the legislation is preventive as opposed to penal in nature.[14] Provinces are entitled to enact legislation aimed at the prevention of crime.[15] Because morality and criminality are not co-extensive, legislation governing a local standard of morality does not necessarily invade the federal criminal law power.

> This is not to say that Parliament is in any way restricted in its authority to pass laws penalizing immoral acts or conduct, but simply that the provincial government in regulating a local trade may set its own standards which in no sense exclude the operation of the federal law.[16]

Thus, obscenity prosecutions may be brought for films that the Board of Censors has approved as conforming to local standards of morality or propriety.[17]

The majority did, however, find one regulation invalid and severable, as it was "virtually identical" to a *Criminal Code* provision[18] forbidding the knowing public exhibition of an indecent show. The use of the word "indecent" in both the provincial and federal enactments was the deciding factor against the validity of the provincial regulation.[19]

Finally, the majority rejected the finding of Justice MacDonald of the Court of Appeal that the legislation is *ultra vires* as infringing on fundamental freedoms of association, assembly, speech, the press and other media, conscience, and religion. The majority of the Supreme Court found no

> justification for concluding that the purpose of the Act was directed to the infringement of one or more of those rights.... [The opposite] conclusion

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12 R.S.C. 1970, c. C-34.

13 *McNeil*, *supra*, note 6, at 691.

14 *Ibid.*, at 691.

15 *Ibid.*, at 692.

16 *Ibid.*, at 693.

17 *Ibid.*, at 693; see, also, *infra*, this ch., sec. 2(c).

18 *Supra*, note 12, s. 159(2)(*b*).

19 *McNeil*, *supra*, note 6, at 698.

> appears to [the majority] to involve speculation as to the intention of the Legislature and the placing of a construction on the statute which is nowhere made manifest by the language employed in enacting it.[20]

The reasons of the four dissenting justices were delivered by Laskin C.J. Part of the dissent's disapproval of the Board's actions stemmed from the fact that the Board had not issued any reasons for its refusal to permit the film to be shown. Laskin C.J. stated:[21]

> [A]n administrative authority like the Board, which is given unfettered and unguided power and discretion to prohibit the public exhibition of a film, and whose statutory power in that respect is challenged as being unconstitutional, cannot shield its exercise of that power by refusing to disclose the grounds upon which it has acted.

The dissent characterized the Board's identification of its own powers in the following terms:[22]

> [T]he Board asserts an unlimited statutory authority to determine for the general public what films are fit for public viewing.

The statute pursuant to which the Board operated fixed no criteria upon which the Board was required to act. Laskin C.J., dissenting, was of the following opinion:[23]

> The determination of what is decent or indecent or obscene in conduct or in a publication, what is morally fit for public viewing, whether in films, in art or in a live performance is, as such, within the exclusive power of the Parliament of Canada under its enumerated authority to legislate in relation to the criminal law.

Because the dissent found the legislation to be *ultra vires* the legislative competence of the provincial government, it did not "consider the larger issue...of the relation of censorship to free speech and the constitutional authority in that respect of Parliament and the provincial Legislatures".[24]

The *McNeil* judgment has been criticized as not clearly indicating where the line between the federal criminal law power and provincial legislative competence is to be drawn. The question of when a province encroaches on

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20 *Ibid.*, at 700-01.

21 *Ibid.*, at 672.

22 *Ibid.*, at 674.

23 *Ibid.*, at 680.

24 *Ibid.*, at 686.

the federal criminal law power is not easily ascertainable by following the reasons for judgment. The confusion is compounded by the manner in which the majority drew the distinction between the reasons for striking out an offending regulation and those for upholding the remaining provisions; the result was that indecent shows could not be prohibited by the province but indecent films could be.[25] It has also been suggested that "the implications of *McNeil* are somewhat confusing.... It is still unclear whether a future Court will accede to the view that the provinces' prior restraint of the medium of film is constitutionally permissible".[26] However, since the *McNeil* decision it has been accepted that provinces may validly establish film review boards.

(ii) Extraprovincial Impact

A recent constitutional challenge to provisions of British Columbia's *Motion Pictures Act*[27] sought a declaration that the Act is *ultra vires* the province as it purports to regulate the distribution of films to persons outside the province.[28] The petitioner had submitted that the legislation fell within the federal jurisdiction over either interprovincial trade and commerce[29] or criminal law.[30] The petitioner did not challenge the issue decided in *McNeil*[31] – that is, that the province can regulate the content of films and videos within the province – but submitted that because the legislation reached outside the province to regulate a business that dealt exclusively in the extraprovincial sale of films, it was *ultra vires* the legislative competence of the province.

The Court concluded that the Act's principal objectives include the prevention of crime, the regulation of business trade practices, and the protection of children, all of which fall within provincial authority. Regulation

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25 See R. Pepin, "Le pouvoir des provinces canadiennes de légiférer sur la moralité publique" (1988), 19 R.G.D. 865, at 876.

26 N. Boyd, "Censorship and Obscenity: Jurisdiction and the Boundaries of Free Expression" (1985), 23 Osgoode Hall L.J. 37, at 62. Although the author used the term "prior restraint", that language is really applicable to a *Charter* and not a "division of powers" analysis.

27 S.B.C. 1986, c. 17

28 *It's Adult Video Plus Ltd. v. British Columbia (Director of Film Classification)* (1991), 81 D.L.R. (4th) 436, at 438 (B.C.S.C.) (hereinafter referred to as "*It's Adult Video Plus Ltd.*").

29 *Constitution Act, 1867, supra*, note 3, s. 91(2).

30 *Ibid.*, s. 91(27).

31 *Supra*, note 6.

of marketing is not its "direct or principal object".[32] Further, "[a]ny regulation of interprovincial trade in those films is valid since it is merely incidental to the proper exercise of jurisdiction in a provincial matter".[33] The Court went on to take the same approach as that taken in *McNeil*; it sought to determine whether the pith and substance of the law "is to prevent crime as distinct from defining and punishing crime or whether it is a colourable attempt to redefine or bolster existing criminal law".[34] In the Court's opinion, there was provincial authority to enact the legislation on the bases of suppressing conditions calculated to give rise to crime, regulating by production and quality control the trade practices or business ethics of provincial businesses, and protecting British Columbians, particularly children, from the surreptitious distribution of prohibited material.[35] The petition was therefore dismissed.

(iii) Constitutional Implications of A National Board

Based on existing jurisprudence, then, constitutional competence to regulate the exhibition, sale, and exchange of films belongs to the provincial governments and not the federal government. The federal government probably does not have the authority to create a national board of this kind based on the criminal law power.[36] Nor would section 91(2) of the *Constitution Act, 1867*,[37] which gives the federal government the competence to regulate "Trade and Commerce", be of assistance. This is because legislation controlling a film board seeks to control the display of films, not their interprovincial sale, and this is a matter within the province's power over property and civil rights.

Thus, a provincial law aimed at protecting children from the harmful effects of cartoon advertising and so banning the use of such advertisements has been held to be *intra vires* the province of Quebec.[38] Even if the law

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32 *It's Adult Video Plus Ltd.*, *supra*, note 28, at 450.

33 *Ibid.*, at 454.

34 *Ibid.*, at 455.

35 *Ibid.*, at 455-59.

36 In *McNeil*, *supra*, note 6, the majority of the Court held that film censorship was not a criminal matter. It is characterized as an administrative process designed to restrain material deemed offensive. Compare the distinction drawn in *It's Adult Video Plus Ltd.*, *supra*, note 28, at notes 32-35, and accompanying text. It would presumably be even more difficult to base a national classification board, as opposed to classification and censorship board, on the criminal law power.

37 *Supra*, note 3.

38 *Attorney-General of the Province of Quebec v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211, 83 D.L.R. (3d) 314.

prohibited commercials made in Ontario from being shown in Quebec, there was no infringement of the federal trade and commerce power.[39]

Similarly, a federal attempt to stipulate standards for apples that would apply to Ontario apples grown and sold in Ontario was held to be *ultra vires* the federal government.[40] The trade and commerce power gives authority only for the regulation of interprovincial and international trade. Thus, Parliament could presumably not enact a scheme that purported to classify or censor films made in one province that would be shown in that province.

Further, it was held by a majority of the Supreme Court of Canada that the trade and commerce power cannot be used to regulate a single trade, even if it is on a national basis.[41] The federal legislation at issue in the *Labatt* case was not concerned with the control of the extra-provincial distribution of the products involved, but with regulating the processes employed within the industry itself. Because it is tied to one industry, it is not a law regulating trade and commerce in the sweeping and general sense intended in the *Citizens Insurance* case.[42]

Thus, if a national board were to be created, it would likely have to be through a mechanism of a co-operative arrangement agreed to by the provinces. The decisions of one board might become *de facto* the decisions of each board. However, each province could assert ultimate control by maintaining a board of its own with final authority to accept decisions of the main board or replace them with decisions of its own. For example, in several of the current provincial Acts, provision is made for the boards to adopt the classifications or approvals of other jurisdictions.

A striking example of this occurs in the Atlantic provinces, where Nova Scotia *de facto* provides the film board for three other provinces. In Prince Edward Island, this arrangement is specified in the legislation, which defines its Board as the Amusements Regulation Board of Nova Scotia.[43] The New Brunswick legislation was amended in 1990 to include a provision enabling its Board to adopt, in accordance with the regulations, the classification

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39 The dissent in this case held that the province could not extend its prohibition to television, a medium outside provincial jurisdiction.

40 *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844, 106 D.L.R. (3d) 581.

41 *Labatt Breweries of Canada Ltd. v. The Attorney General of Canada*, [1980] 1 S.C.R. 914, 30 N.R. 496 (subsequent references are to [1980] 1 S.C.R).

42 *Ibid.*, at 935. See *The Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, [1881-5] All E.R. Rev. 1179 (P.C.).

43 *Films Act*, R.S.P.E.I. 1988, c. F-8, s. 1(a). See, also, *Theatres and Amusements Act*, R.S.N.S. 1967, c. 304.

accorded to films or videofilms by another jurisdiction.[44] While New Brunswick retains its own Board, it in fact adopts, for English-language films, the decisions of the Nova Scotia Board and, for French-language films, the decisions of the Quebec Régie du cinéma.[45] In Newfoundland, the practice is to rely on the New Brunswick decisions, which, as we have seen, in turn rely on the Nova Scotia Board. There is no legislation in Newfoundland that requires this practice to be followed.

Similarly, the Manitoba Act[46] provides that its Board may

> subject to guidelines...classify a film...by adopting a classification of the film by another person or by a body established by the legislation of another province or a territory of Canada to classify, review or approve films.

The Saskatchewan Act provides that in certain circumstances, its Board may base its approval on "an approval previously given to the film by...a body that classifies, reviews or otherwise approves films and that is established pursuant to the legislation of another province or territory of Canada".[47] The legislation goes further and envisages a possible joint board. Section 16(1)(b) provides that the Lieutenant Governor in Council may make regulations authorizing the Board to enter into agreements with another Canadian province, or with a board established by legislation in another province or territory, for the purpose of establishing a joint classification board.[48]

Thus all of these arrangements, other than that of Prince Edward Island, are permissive; they *allow* but do not require local boards to adopt decisions of other provinces. This permits each province to retain ultimate control over its decisions while reducing some of the multiplicity of effort and expense.

The Ontario legislation[49] contains no such provision; all decisions about film and video viewing in Ontario must be made by the Ontario Film Review

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44 *An Act to Amend the Film and Video Act*, S.N.B. 1990, c. 54, s. 3(*b*), amending s. 6(4) of the *Film and Video Act*, S.N.B. 1988, c. F-10.1.

45 Conversation with New Brunswick Board (July 6, 1992).

46 The *Amusements Act*, R.S.M. 1987, c. A-70 (also C.C.S.M., c. A70), s. 23(g), as am. by S.M. 1991-92, c. 7, s. 7.

47 See *The Film and Video Classification Act*, S.S. 1984-85-86, c. F-13.2, s. 4(3)(b)(i); the Board must ensure that the criteria used in the other jurisdiction are "compatible and consistent with" its own governing criteria. However, s. 4(4)(a) and (b) ensure that the Board does not disapprove a film or require eliminations therefrom without having viewed the film itself.

48 *Ibid.*, s. 16(1)(b).

49 *Theatres Act*, R.S.O. 1990, c. T.6.

Board.[50] The Memorandum of Understanding between the Minister of Consumer and Commercial Relations and the Ontario Film Review Board states that the "Board shall obtain the approval of the Minister prior to entering into any formal relationships with regulatory bodies of other jurisdictions".[51]

a. Conclusions Concerning a National Board

A national board would minimize expense, multiplication of effort and consumer confusion. The reduction in expense would be particularly important for small distributors. Such a board would also reflect the emergence of a national community standard, which is due in large part to an expansion in technology that renders images from many jurisdictions accessible and prevalent across the country. Further, the existence of one standard that applies nationally would improve the quality and the transmission of information to the public. A single rating would accompany advertisements for films and could be included on leaders to videotapes. Leaders to films shown in theatres could also include classification information. As noted above, the best way to institute an initial move toward a national board would be through a mechanism of co-operative provincial arrangements. The Commission recommends that the *Theatres Act*[52] be amended to allow the Ontario Film Review Board to adopt the classifications granted to films by other boards in remaining provincial jurisdictions. The Ontario Board should retain ultimate authority to accept or reject the classifications of other boards. This control ensures that local accountability will be maintained.

By instituting such an amendment, the provinces may move toward the creation of a national board by a permissive, co-operative mechanism. By structuring the arrangement so that provinces are in effect entering into the arrangement voluntarily, by agreement, and by maintaining flexibility through granting each Board ultimate decisional authority, provinces, the public, and

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50 Further, as noted in ch. 1 of this Report, the decisions made by the Ontario Board may already have a disproportionately strong influence on what is viewed across the country, for "editions of films shown in Saskatchewan, the Atlantic provinces and the Territories usually originate at the Ontario Film Review Board...": S.G. Cole, *Pornography and the Sex Crisis* (Toronto: Amanita Enterprises, 1989), at 88-89. See, also, L. King, "Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better?" in V. Burstyn (ed.), *Women Against Censorship* (Vancouver: Douglas & McIntyre, 1985) 79, at 80, and J. Patrick, "Censored", *The Toronto Star* (August 16, 1980), Today Section 7.

51 Memorandum of Understanding between the Minister of Consumer and Commercial Relations and the Ontario Film Review Board, VI.6 (hereinafter referred to as "Memorandum of Understanding").

52 *Supra*, note 49.

the industry will have a chance to see whether a national system is feasible and desirable. If ultimately viewed as desirable, a more formalized arrangement may eventually be instituted.

In order to facilitate the workings of a co-operative arrangement, Ontario should, with the rest of the provinces, work out an agreement on uniform categories of classification. These are discussed in more detail in chapter 4 below.

(b) THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

The *Canadian Charter of Rights and Freedoms*[53] is relevant to the issues of film censorship and obscenity in a variety of ways. *Charter* challenges to both the *Theatres Act*[54] and the obscenity provision of the *Criminal Code*[55] have been launched. The section that is primarily relevant for challenges of this kind is section 2(*b*),[56] which provides:

> 2. Everyone has the following fundamental freedoms:
>
> . . .
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Also important will be *Charter* section 1, which states:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law can be demonstrably justified in a free and democratic society.

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53 *Supra*, note 1.

54 *Supra*, note 49.

55 R.S.C. 1985, c. C-46, s. 163.

56 It is very likely that *Charter* s. 2(*b*), and not s. 7, would be used for the mounting of such a challenge. The latter provision states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". In order for a s. 7 challenge to succeed, there would first have to be a determination that a plaintiff's life, liberty, or security of the person had been infringed, which is unlikely in legislation of this kind. Even if such an infringement were found to exist, the hurdle of not being "in accordance with the principles of fundamental justice" would have to be crossed for a successful challenge to occur. Given the procedural provisions in the *Theatres Act*, *supra*, note 49, discussed in more detail below, such a determination is also unlikely to be made. Thus, the important *Charter* section remains s. 2(*b*).

(i) Challenges to the *Theatres Act*

In 1983, the Ontario Divisional Court rendered a decision[57] in an application by the Ontario Film and Video Appreciation Society contesting the constitutional validity of the Ontario Censor Board, as it was then called, under the provisions of the *Theatres Act*.[58] The challenge was based on section 2(*b*) of the *Charter*,[59] and focused on the power of the Board to "censor any film", to "prohibit...the exhibition of any film in Ontario", as well as the requirement that "all film" be "submitted to the Board for approval" and the prohibition against the exhibition of "any film that has not been approved by the Board".[60]

The factual context of the case concerned four films submitted by the applicant to the respondent Board, two of which were approved for exhibition only at one time and one place, and two of which were rejected. One of the rejections had to do with the explicit portrayal of sexual activity. At the time, the legislation provided that regulations could be made prohibiting and regulating the use and exhibition of films, but none had been issued. The Board itself had issued a document entitled "Standards for classification and/or Censorship of Films". The document was not legally binding on the Board and was used as a guideline.

The Court quickly decided that the legislation infringed the *Charter's* freedom of expression guarantee and moved on to a consideration of section 1. In an early section 1 test that bore only some resemblance to the test ultimately adopted as constituting the proper section 1 analysis,[61] the Court decided that some prior film censorship was demonstrably justifiable in a free and democratic society.

The Court considered the second part of the section 1 test to be a determination of whether the limits were reasonable; however, it did not express an opinion on that issue as it decided that on the third component of the test the legislation failed completely. That component required the limits to be prescribed by law. Limitations could, in the opinion of the Court, take the form of legislation, regulations, or common law, but had to have legal force. In the case before the Court, the pamphlet outlining guidelines

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57 *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 41 O.R. (2d) 583, 147 D.L.R. (3d) 58, aff'd. *infra*, notes 62 and 64 (hereinafter referred to as "*OFAVAS I*").

58 *Theatres Act*, R.S.O. 1980, c. 498.

59 *Supra*, note 1.

60 *OFAVAS I*, *supra*, note 57, at 586-87.

61 See *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

on which decisions were to be made did not have the force of law, nor were there other legal limitations on the broad powers set out in the legislation that could be said to be limitations "prescribed by law".

The Court held, first, that the classification scheme on its own did not offend the *Charter*; and second, that the provisions authorizing censorship and prohibition were not null and void but simply inoperable. They could be rendered operable by the passage of regulations or statutory amendments that imposed reasonable limits.

The decision was appealed to the Ontario Court of Appeal,[62] which agreed with the Divisional Court that the impugned provisions constituted a limit on the *Charter* guarantee of freedom of expression. The Court stated that it was prepared to go much farther than the lower Court, which had declared the sections of "no force or effect", and declared the provisions to be *ultra vires* because they constituted a complete denial of free expression, and not a mere limit as contemplated by section 1 of the *Charter*. The Court expressly left open the issue of "whether there can be legislated guidelines for the Ontario Board of Censors so as to be reasonable limits prescribed by law on the freedom of expression, demonstrably justified in a free and democratic society".[63] The appeal was thus dismissed.

Leave to appeal to the Supreme Court of Canada was granted.[64] However, the Ontario Legislature amended the Act[65] and provided for regulations to be made setting out precise guidelines to govern the exercise of the Board's discretion.[66] Consequently, the appeal was abandoned.

a. Conclusions

This issue thus remains unresolved, as the Ontario Court of Appeal explicitly left open the issue of whether legislated guidelines for the Board would satisfy the section 1 *Charter* requirements. However, given the direction taken by the Supreme Court of Canada in the *Butler*[67] and

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62 *OFAVAS I* (1984), 45 O.R.(2d) 80, 147 D.L.R. (3d) 58 (C.A.) (subsequent references are to 45 O.R. (2d)).

63 *Ibid.*, at 82.

64 (1984), 3 O.A.C. 318 (S.C.C.).

65 See *Theatres Amendment Act, 1984*, S.O. 1984, c. 56.

66 See Regulation under the *Theatres Act*, O. Reg. 487/88.

67 *R. v. Butler*, [1992] 1 S.C.R. 452, 70 C.C.C. (3d) 129 (subsequent references are to [1992] 1 S.C.R.) (hereinafter referred to as "*Butler*").

Keegstra[68] cases, discussed below, we would have to conclude that limits on expression of the kind that now exist in the *Theatres Act* and its regulations will likely satisfy the section 1 test. The debates in the Ontario Legislature of 1984[69] reflect a goal of avoiding a pressing and substantial harm as opposed to controlling morality.[70] The proportionality test would also have to be passed. The Court would have to decide that there is a rational connection between the goal and the legislation, that the legislation impairs the guarantee of free expression as little as possible, and that there is an acceptable balance between the effects of the limiting legislation and the legislative objective.

The recommendations of this Report will be made based on the assumption that the courts would uphold the constitutionality of the Film Board's classification and approval powers. This is because the position of the courts in determining constitutionality has always been that they are not to pass on the wisdom of the legislation, but merely on the issue of whether the government was entitled to enact it.[71] This Report, however, is directly concerned with the wisdom of the legislation. Thus, by assuming its constitutionality, the recommendations of the Report will be able to focus on the more relevant, and more difficult, issue of whether it is a wise piece of legislation.

(ii) The *Charter* and the Criminal Obscenity Provisions

The constitutionality of section 163 of the *Criminal Code*[72] was determined by the Supreme Court of Canada in the case of *R. v. Butler*.[73] The impugned provision is found in Part V of the Code, which deals with

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68 *R. v. Keegstra*, [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1 (subsequent references are to [1990] 3 S.C.R.).

69 See, for example, Ontario, Legislative Assembly, *Debates*, November 13, 1984, at 4110.

70 These goals are consistent with provincial legislative competence. In *McNeil*, *supra*, note 6, it was held that the legislation was *intra vires* the province as it was preventive, not penal, in nature and related to the provincial matter of regulation of a business; in *It's Adult Video Plus Ltd.*, *supra*, note 28, prevention of crime and protection of provincial citizens were held to be valid provincial purposes. See *supra*, notes 32-35 and accompanying text.

71 See, for example, the words of Duff C.J. in *Reference re Alberta Statutes*, [1938] S.C.R. 100, at 106-07, [1938] 2 D.L.R. 81, at 83. See, also, *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 *per* Wilson J. in her separate reasons concurring in the result, at 472, S.C.R., at 504 D.L.R.: "The question before us is not whether the government's defense policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*. This is a totally different question".

72 *Supra*, note 55.

73 *Supra*, note 67.

"Sexual Offences, Public Morals and Disorderly Conduct", under a sub-heading entitled "Offences Tending to Corrupt Morals". Section 163 establishes several offences related to the printing, publication, distribution, circulation, sale, exposure to public view, or public exhibition of obscene matters in various media or "a disgusting object or an indecent show". Subsection (8) is the definitional provision; it states:[74]

> 163.—(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

"Publication" has been held to encompass films.[75] Also included in Part V are offences of using the mails to transmit obscene, indecent, immoral, or scurrilous materials,[76] of selling or exposing to public view any obscene matter,[77] and of publicly exhibiting a disgusting object or an indecent show.[78] Section 169 sets out the punishment for the offences contained in sections 163, 165, 166, 167, and 168.

a. The Interpretation of Section 163(8) and the Butler Decision

The Court in *Butler*[79] confined itself to a consideration of the constitutionality of the definitional portion of section 163;[80] it did not discuss the *Charter* issues raised by the reverse onus provision in section 163(3) or the absolute liability offence created in section 163(6). These therefore remain open issues.

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74 There has been a statutory definition of obscenity only since amendments to the *Criminal Code* entered into force in 1959: *Criminal Code*, S.C. 1953-54, c. 51, s. 150(8), as en. by S.C. 1959, c. 41, s. 11. See *Butler*, *supra*, note 67, at 142. The statutory definition replaced the original common law test found in *R. v. Hicklin* (1868), L.R. 3 Q.B. 360.

75 It was said in *Towne Cinema Theatres Ltd. v. R.*, [1985] 1 S.C.R. 494, at 501-02, 45 C.R. (3d) 1, at 12 (subsequent references are to [1985] 1 S.C.R.): "Any doubt that might previously have existed on the question of whether s. 159(8) embodied the proper or the exclusive test for obscenity in relation to film was implicitly resolved by this Court in *Dechow v. The Queen*, [1978] 1 S.C.R. 951.... A number of decisions in various jurisdictions had previously concluded that films were 'publications' and therefore properly dealt with under s. 159(8) (see *R. v. Fraser*, [1966] 1 C.C.C. 110 (B.C.C.A.); *R. v. Goldberg and Reitman*, [1971] 3 O.R. 323 (C.A.); and *Daylight Theatre Co. v. The Queen* (1973), 17 C.C.C. (2d) 451 (Sask. Dist. Ct.)".

76 *Criminal Code*, *supra*, note 55, s. 168.

77 *Ibid.*, s. 163(2)(*a*).

78 *Ibid.*, s. 163(2)(*b*).

79 *Supra*, note 67.

80 *Criminal Code*, *supra*, note 55.

In embarking upon its analysis, the Court set out the various components that judicial interpretation over the years has ascribed to section 163(8). First, it noted that the courts have determined that the statutory definition is to be the exclusive one; common law definitions are no longer to be relied upon.[81] Second, it is clear in the definition that in order for something to be obscene, it must have a dominant characteristic of the "undue exploitation of sex", the tests for which are threefold. First, there is a community standard of tolerance measure that is a national standard[82] and that must be responsive to changing societal mores.[83] A second test, which indicates material as unduly exploiting sex and which may or may not be tolerated under the community standards test, is whether the material is degrading or dehumanizing.[84] Third, there is an "internal necessities" test, also called the "artistic defence".[85] This is the "last step in the analysis of whether the exploitation of sex is undue".[86] Thus, even if material has failed the other branches of the test, it will not be considered to be undue exploitation if it "is required for the serious treatment of a theme".[87]

In *R. v. Odeon Morton Theatres Ltd.*,[88] Freedman C.J.M. noted that many considerations were relevant in determining what the community

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81 *Butler, supra*, note 67, at 475, citing *Brodie v. R.*, 132 C.C.C. 161, at 179, [1962] S.C.R. 681, at 702, and *Dechow v. R.*, [1978] 1 S.C.R. 951, at 962, 35 C.C.C. (2d) 22, at 30.

82 See *Butler, supra*, note 67, at 476, citing *R. v. Cameron*, [1966] 2 O.R. 777, [1966] 4 C.C.C. 273 (C.A.), aff'd. [1967] 2 C.C.C. 195*n*, 62 D.L.R. (2d) 326*n* (S.C.C.). One difficulty with the community standard test is that "one's perception of the community's standard concerning explicit sexual material is primarily explained by one's personal standard...": J.E. Scott, "What is Obscene? Social Science and the Contemporary Community Standard Test of Obscenity" (1991), 14 Int'l. J.L. & Psychiatry 29, at 42.

83 See *R. v. Dominion News & Gifts (1962) Ltd.*, [1963] 2 C.C.C. 103, at 116-17, 42 W.W.R. 65, at 80 (Man. C.A.), *per* Freedman J.A. (dissenting). (The reasons of Freedman J.A. were subsequently endorsed by the Supreme Court of Canada in their entirety: [1964] S.C.R. 251, [1964] 3 C.C.C. 1.)

84 *Butler, supra*, note 67, at 478-81. Some courts have found this to be a subset of the community standards test: *R. v. Doug Rankine Co.* (1983), 9 C.C.C. (3d) 53, 36 C.R. (3d) 154 (Ont. Co. Ct.); *R. v. Ramsingh* (1984), 29 Man. R. (2d) 110, 14 C.C.C. (3d) 230 (Q.B.); *R. v. Wagner* (1985), 36 Alta. L.R. (2d) 301, 43 C.R. (3d) 318 (Q.B.); aff'd. (1986), 43 Alta. L.R. (2d) 204, 26 C.C.C. (3d) 242 (C.A.); leave to appeal refused (1986), 26 C.C.C. (3d) 242*n*, 50 C.R. (3d) 175*n* (S.C.C.). Dickson C.J. in *Towne Cinema Theatres Ltd. v. R.*, *supra*, note 75, at 505, however, noted that "it is unfortunate but true that the community may tolerate publications that cause harm to members of society and therefore to society as a whole. Even if, at certain times, there is a coincidence between what is not tolerated and what is harmful to society, there is no necessary connection between these two concepts".

85 *Butler, supra*, note 67, at 481.

86 *Ibid.*, at 482.

87 *Ibid.*, at 482.

88 (1974), 16 C.C.C. (2d) 185, 45 D.L.R. (3d) 224 (Man. C.A.) (subsequent references are to 16 C.C.C. (2d)).

standards in Canada are. These factors in the case before him included the testimony of experts, the accordance of a "restricted" classification to the film, and the fact that the film had passed the scrutiny of film review boards of several provinces.[89] Further, in the definition of community standards it is important to bear in mind that Dickson C.J. in the *Towne Cinema* case cautioned:[90]

> [I]t is a standard of *tolerance*, not taste, that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it.

In *Butler*, Sopinka J. dealt with the interrelationship of these tests in elaborating the provision before subjecting it to scrutiny under the "void for vagueness" doctrine.[91] In establishing a relationship between the community standards test and the degrading or dehumanizing test, he divided pornographic material into three categories: "(1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing".[92] The first category will "almost always" constitute the undue exploitation of sex; the second will do so if the risk of harm is substantial; the third will only do so if it employs children in its production.[93] If, once these tests are applied, the material is found to exploit sex unduly, the internal necessities test will be applied, in which the "portrayal of sex must...be viewed in context to determine whether that is the dominant theme of the work as a whole".[94] If the work can be viewed as having an "artistic, literary, or other similar purpose", it is not caught within the obscenity provision of the Code.

Having established the proper judicial interpretation of the section, Sopinka J. moved on to consider whether section 163(8) of the *Criminal Code* violates section 2(*b*) of the *Charter*.[95] He reiterated the "generous

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89 *Ibid.*, at 196.

90 *Towne Cinema Theatres Ltd. v. R., supra*, note 75, at 508.

91 *Butler, supra*, note 67, at 483-86. See *infra*, this ch., notes 99-100 and accompanying text.

92 *Butler, supra*, note 67, at 484.

93 *Ibid.*, at 485.

94 *Ibid.*, at 486.

95 *Supra*, note 1. See *Butler, supra*, note 67, at 486.

approach" taken by the Court to section 2(*b*)[96] and was quick to conclude that:[97]

> both the purpose and effect of s. 163 is specifically to restrict the communication of certain types of materials based on their content.... [T]here is no doubt that s. 163 seeks to prohibit certain types of expressive activity and thereby infringes s. 2(*b*) of the *Charter*.

Before moving on to the section 1 analysis, Sopinka J. rejected the submission of the Attorney General of British Columbia that film should be treated differently under section 2(*b*) from written works. It had been submitted that written works were communicative in a way film was not. Sopinka J. held that purely physical activity could in itself be communicative and that if images of such activity were chosen to go in a film, the purpose was inherently communicative.[98]

Because the provision was found to infringe section 2(*b*) of the *Charter*, the Court had to determine whether it was a limitation that could be justified under section 1 thereof as reasonable and demonstrably justified in a free and democratic society. Section 1 also requires that a limit be "prescribed by law". Sopinka J. began the section 1 analysis with a consideration of the "prescribed by law" issue.

Asking the question of whether the law is so vague that "it does not qualify as 'a limit prescribed by law', " Sopinka J. repeated the test as consisting of determining "whether the law 'is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools'."[99] Sopinka J. concluded that words such as "undue" "escape precise technical definition" but fall within the role of judicial interpretation. As long as an "intelligible standard" is provided by this interpretation, the "prescribed by

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96 He refers to *R. v. Keegstra*, *supra*, note 68; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65. See, also, *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, and *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577.

97 *Butler, supra*, note 67, at 489.

98 Note that in Great Britain, *Report of the Committee on Obscenity and Film Censorship* (Cmnd. 7772, 1979) (the "Williams Committee"), the Committee concluded that different media ought to be treated according to different standards: para. 12.7, at 144. The Committee concluded that the printed word should be neither restricted nor prohibited (at 160, recommendation 6), but that restrictions could apply to matter other than the printed word (at 160, recommendations 7 *et seq.*). Prohibitions could apply in certain circumstances to films and photographs (at 161, recommendations 19 *et seq.*). See, also, *ibid.*, recommendations 34 to 56.

99 *Butler, supra*, note 67, at 490, citing *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at 94, 82 D.L.R. (4th) 321, at 339.

law" element is satisfied. Such a standard was achieved through the judicial elaboration of the obscenity provision.[100]

The Court then proceeded with the section 1 test mandated by its decision in *R. v. Oakes*.[101] It thus began by establishing the objective to be achieved by the section. The objective of the original common law prohibition against obscenity was "to advance a particular conception of morality"; such an objective would not be a valid one today. This is not to say that Parliament cannot legislate on "the basis of some fundamental conception of morality"; much of the criminal law is based on such a conception. However, according to the decision of the majority, the "overriding objective" of the current obscenity provision was avoiding harm to society.[102]

In determining whether the objective dealt with a "pressing and substantial concern", Sopinka J. cited the *Keegstra* decision[103] to demonstrate that the Supreme Court has "recognized that the harm caused by the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression".[104] The Court referred to the words of both Nemetz C.J.B.C. and Anderson J.A. in *R. v. Red Hot Video Ltd.*[105] in reaching its conclusion that material of the kind section 163 seeks to regulate causes a similar type of harm to that at issue in *Keegstra*. Chief Justice Nemetz had noted a "growing concern that the exploitation of women and children, depicted in publications and films can, in certain circumstances, lead to 'abject and servile victimization'".[106] Sopinka J. also paraphrased the reasons of Anderson J.A. to the following effect:[107]

> if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on 'the individual's sense of self-worth and acceptance'.

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100 *Butler, supra,* note 67, at 491.

101 *Supra*, note 61.

102 *Butler, supra,* note 67, at 493.

103 *R. v. Keegstra*, *supra*, note 68.

104 *Butler, supra,* note 67, at 496.

105 (1985), 18 C.C.C. (3d) 1, 45 C.R. (3d) 36 (B.C.C.A.); leave to appeal to S.C.C. refused (1985), 46 C.R. (3d) xxvn (S.C.C.).

106 *Butler, supra*, note 67, at 496-97.

107 *Ibid.*, at 497.

Sopinka J. went on to note that "the burgeoning pornography industry renders the concern even more pressing and substantial than when the impugned provisions were first enacted".[108] He thus concluded that the objective was pressing and substantial enough to warrant a limitation on a constitutional guarantee; he noted that the proportionality portion of the section 1 test would be undertaken "in light of the conclusion that the objective of the impugned section is valid only in so far is it relates to the harm to society associated with obscene materials".[109] At the beginning of the proportionality discussion, Sopinka J. emphasized that the kind of expression sought to be suppressed – not material that celebrates sexuality but that deprives people of unique human characteristics and dignity, and is motivated by financial profit – "does not stand on equal footing with other kinds of expression which directly engage the 'core' of the freedom of expression values".[110]

The first element of the proportionality test requires a determination of whether there is a rational connection between the impugned measures and the objective. In terms of obscenity, the rational connection would depend upon the existence of a causal relationship between the obscene material and increased related harm to society. Because social science evidence in this area is inconclusive, the Court relied on its approach in *Irwin Toy Ltd. v. Quebec (Attorney General)*[111] in permitting the Legislature a "margin of appreciation" within which to act. Thus, in the case at hand, the rational connection criterion was satisfied because[112]

> Parliament was entitled to have a 'reasoned apprehension of harm' resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations.

The second portion of the proportionality test requires that the right be impaired minimally. The Court held that section 163(8) satisfies this requirement because, first, "the impugned provision does not proscribe sexually explicit erotica without violence that is not degrading or dehumanizing".[113] Second, materials of scientific, literary or artistic value are not caught by the provision. Third,

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108 *Ibid.*, at 498.

109 *Ibid.*, at 498.

110 *Ibid.*, at 500.

111 *Supra*, note 96.

112 *Butler, supra*, note 67, at 504.

113 *Ibid.*, at 505.

> [t]he attempt to provide exhaustive instances of obscenity has been shown to be destined to fail (Bill C-54, 2nd Sess., 33rd Parl.). It seems that the only practicable alternative is to strive towards a more abstract definition of obscenity which is contextually sensitive and responsive to progress in the knowledge and understanding of the phenomenon to which the legislation is directed....[t]he standard of 'undue exploitation' is therefore appropriate.[114]

Finally, the provision has been previously held not to apply to private viewing of materials.[115] Time, place, and manner restrictions would be inadequate to attaining the objective of avoiding harm. Other educational and counselling methods suggested aim at responding to the harm and not at controlling the dissemination of materials that lead to its existence. The government does not have to choose between complementary methods.[116]

Finally, the Court considered the balance between the effects of the legislative provisions and their objectives. The provisions in this case do not attack the heart of a constitutional guarantee, while their objective is one of fundamental importance. Thus, the restriction does not outweigh the importance of the objective.[117]

In upholding the criminal obscenity provision under section 1 of the *Charter*, the Court has given clearer direction on the exact meaning to be ascribed to the section, and has limited the definition of criminal obscenity so that it captures only material that creates a risk of harm. Within these parameters, prosecution for obscenity under the *Criminal Code* may still occur.[118]

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114 *Ibid.*, at 506.

115 *Ibid.*, at 506, citing *R. v. Rioux*, [1969] S.C.R. 599, [1970] 3 C.C.C. 149.

116 *Butler*, *supra*, note 67, at 509.

117 *Ibid.*, at 509.

118 A recent application of the *Butler* decision, *ibid.*, to printed materials is found in *R. v. LaLiberté*, unreported (May 29, 1992, Ont. Gen. Div.). Nosanchuk J., in applying the interpretation in *Butler* to the facts before him, held that "the prosecution must indicate the harm that may flow from such exposure" and should also show that such harm is "substantial", that it is "directly related to the immediacy of a risk of harm" and that there is "an actual causal relationship between the obscenity and the risk of harm", causing persons to act in an anti-social manner by committing conduct which "society formally recognizes as incompatible with its proper functioning" (at 35). Nosanchuk J. concluded that the materials before him were not exploitive of sex and were "essentially literary and artistic ventures". Another recent Ontario judgment applying *Butler* to video cassettes and resulting in an acquittal was *R. v. Hawkins*, unreported (April 10, 1992, Ont. Gen. Div.), rendered orally by Misener J. The accused was acquitted because the material, although explicit, was not degrading or dehumanizing and did not carry a risk of harm to "the peace, order, and well-being of society" (at 13). However, a conviction was entered with respect to videos in *R. v. Jorgenson*, unreported (May 27, 1982, Ont. Prov. Ct.), *per* Mitchell J.

b. Section 7

In *R. v. Red Hot Video Ltd.*,[119] the British Columbia Court of Appeal held that the definition set out in the obscenity section and interpreted by the courts was not so vague as to offend the requirement for fundamental justice in section 7 of the *Charter*.[120] While section 7 was not discussed in *Butler*,[121] a similar discussion of vagueness occurred in the section 1 determination of whether the limitation was sufficiently precise to be "prescribed by law". As noted above, Sopinka J. concluded that through judicial elaboration, the term was precise enough to be considered "prescribed by law".[122] Thus, any section 7 challenge based on vagueness would also fail.

c. The Hate Propaganda Comparison

As noted elsewhere in this Report,[123] parallels have been drawn by academics and in other publications between the *Criminal Code*[124] provisions governing hate propaganda and the regulation of pornography. Similar *Charter* analyses of each provision have been issued by the Supreme Court of Canada.[125] The upholding of the hate propaganda law under section 1 of the *Charter* is a further indication that courts are willing to find even *Criminal Code* limitations on expression to be constitutionally permissible where the objective of avoiding harm[126] is a pressing one in the circumstances, and the legislation is crafted carefully enough to pass the proportionality review mandated by that section.

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119 *Supra*, note 105.

120 *Supra*, note 1.

121 *Supra*, note 67.

122 See discussion *supra*, notes 99-100 and accompanying text. See, also, *Butler*, *supra*, note 67, at 490-91.

123 See *supra*, ch.2, s. 4(a)(i).

124 *Supra*, note 55.

125 See *R. v. Keegstra*, *supra*, note 68, and *Butler*, *supra*, note 67.

126 *R. v. Keegstra*, *supra*, note 68, at 758. The *Butler* case also considers the objective of avoiding harm to be pressing: see *Butler*, note 67, at 493, 498.

(c) The Federal Obscenity/Provincial Board Overlap Problem

It has been determined that both the federal and the provincial governments have jurisdiction to legislate in this area[127] and that the provisions on which obscenity prosecutions are based are constitutionally valid.[128] The result will necessarily be some overlap between the methods employed by the two jurisdictions. Films that pass through provincial boards and comply with any orders regarding classification and eliminations are still subject to criminal obscenity legislation.

In fact, the relationship between criminal prosecutions and the film boards is a complicated one. In the Manitoba House of Common debates[129] on Bill 70, the Bill that would amend *The Amusements Act*[130] to rid that provincial Board of its censorship powers, many members were concerned about the effect that removal of the Board's elimination functions would have on small theatre owners. That is, many in the industry and in the Legislature saw the Board as a kind of *de facto* if not *de jure* protection against subsequent criminal prosecution for obscenity. If the Board lost its elimination power, theatre owners would be widely subject to criminal prosecution.[131] Further, many consider it unlikely that films which pass through the Board would be convicted under the *Criminal Code*[132] provisions because community standards are relevant both to film Boards[133] and to the criminal law.[134]

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127 *McNeil, supra*, note 6.

128 The constitutionality of prior censorship of films has not been conclusively determined: see *supra*, note 62, and accompanying text, concerning the Court of Appeal decision in the *OFAVAS I* case. The constitutional validity of the *Criminal Code*'s obscenity provision was upheld in *R. v. Butler*, *supra*, note 67.

129 Manitoba, Legislative Assembly, *Debates and Proceedings*, July 4, 1972.

130 *Supra*, note 46, as am. by S.M. 1972, c. 74.

131 It has also been suggested that much less material will be censored if the boards lose their "preclearance" power and the only mechanism to get at the material is subsequent prosecution. See King, *supra*, note 50, at 83, citing "writer John Jeffries". A different spin was placed on this by Susan Cole, who wrote in 1989: "While film censorship does almost nothing for women, it does, ironically, do a great deal for pornographers. By demanding that scenarios that might violate the Criminal Code be cut from pornography, the censor board actually winds up protecting pornographers from criminal prosecution by doing the pornographers' clean-up work for them": Cole, *supra*, note 50, at 93.

132 *Supra*, note 55.

133 See Memorandum Of Understanding, *supra*, note 51, III.3.(d).

134 See *supra*, notes 82-83, 88-90 and accompanying text. However, the criminal law considers national community standards while the film boards are more local in focus.

It is, however, not true that film boards provide protection from future criminal prosecution.[135] It has been held that the approval of a film by a provincial board provides no defence or excuse to a *Criminal Code* charge of obscenity.[136] Further, even if a conviction is not entered, owners and distributors have to face the expense and stigma of criminal prosecutions for films "approved" by the provincial boards. These are seen as serious problems by theatre owners, distributors, and video retailers.

There have been various methods suggested for dealing with this overlap problem. The early Ontario legislation provided that:[137]

> 6. All films passed or permitted to be exhibited by the said Board of Censors shall be stamped in such manner that the stamp will show upon the canvas, screen or any substitute therefor, unless otherwise authorized, such authorization to be submitted to the inspection of any person on demand, and no exhibition of such film shall be prohibited by any police officer, or constable, or other person, on account of anything contained in such film.

However, this was amended in 1914 to remove the prohibition on police officers' power to refuse exhibition;[138] such a provision would be *ultra vires* the provincial Legislature as it "represented a provincial law confining actions which came under the Federal Criminal Code".[139]

A more recent attempt to avoid the situation in which retailers and theatre owners who had passed through the proper provincial film board channels may still be subject to criminal prosecution was put forward in the Bill entitled *Criminal Law Reform, 1984*.[140] Section 37 of that Bill provided

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135 However, Freedman C.J.M. in *R. v. Odeon Morton Theatres Ltd.*, *supra*, note 88, at 196, did list the passing of a film by a provincial film board as one thing to take into account in determining what community standards are in a criminal obscenity decision. Further, a board that enters into an agreement with the police or the Attorney General could provide this kind of protection. See *infra*, notes 142-144 and accompanying text.

136 *McNeil*, *supra*, note 6, at 693. See, also, *R. v. McFall* (1975), 26 C.C.C. (2d) 181 (B.C.C.A.), in which the majority held that the fact that a provincial censor board has passed a film cannot provide an excuse for the commission of an offence under the *Criminal Code*. Approval is merely evidence that a jury can use in deciding the issue of obscenity. See, also, *R. v. Daylight Theatre Co.* (1973), 13 C.C.C. (2d) 524, 41 D.L.R. (3d) 236 (Sask. C.A.). Compare the words of Wilson J. in *Towne Cinema Theatres Ltd. v. R.*, *supra*, note 75, at 531: "There is no question that the approval of the censor board does not preclude the preferring of an indictment". In her opinion, the boards were useful in providing evidence of community standards: *ibid.*, at 530.

137 *The Theatres and Cinematrography Act*, 1 Geo. V, c. 73 (Ont.), s. 6, as en. by *An Act to amend The Theatres and Cinematographs Act*, 1912, 2 Geo. V, c. 54 (Ont.), s. 3.

138 *The Theatres and Cinematrography Act*, R.S.O. 1914, c. 236, s. 6, as am. by *The Statute Law Amendment Act, 1914*, 4 Geo. V, c. 21 (Ont.), s. 53(2).

139 M. Dean, *Censored! Only in Canada* (Toronto: Virgo Press, 1981), at 135.

140 Bill C-19, 1983-84 (32d Parl., 2d Sess.), s. 37.

for an addition to follow then section 163 of the *Criminal Code*;[141] the addition read as follows:

> 163.1 Where any film or videotape is presented, published or shown in accordance with a classification or rating established for films or videotapes pursuant to the law of the province in which the film or videotape is presented, published or shown, no proceedings shall be instituted under section 159 or 163 in respect of such presentation, publication or showing or in respect of the possession of the film or videotape for any such purpose without the personal consent of the Attorney General.

This Bill, however, died on the order paper, and no such provision exists in the current *Criminal Code*.

Quebec and British Columbia have developed different ways of dealing with this problem. In Quebec, there exists an unwritten agreement between the police and the provincial film board, so that films that have complied with provincial regulation will not form the basis for criminal prosecution.[142] In British Columbia, the Board has moved from reporting to the Ministry of Consumer and Corporate Affairs to reporting to the Ministry of the Attorney General, the ministry responsible for prosecutions. In addition, the *Motion Pictures Act*[143] sets out the criteria according to which scenes may be required to be removed from films. These are seen to be very close to the *Criminal Code* obscenity provision; it is thus "unlikely" that there would be prosecution of a film that has been approved by the Board.[144]

In the absence of any such agreements, formal or informal, it is thus currently left up to police to lay charges and provincial prosecutors to decide whether they will undertake obscenity prosecutions pursuant to the *Criminal*

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141 R.S.C. 1970, c. C-34, now *Criminal Code*, *supra*, note 55, s. 167.

142 In Quebec, there is an unwritten agreement between the film board, the "Régie du cinéma" (hereinafter referred to as the "Régie"), and the police that the latter will not lay charges on the basis of any films or videos that have passed through the Régie. Only those films and videos that have not been submitted to the Régie according to law will form the bases for prosecution. However, police do, of course, retain ultimate authority to lay charges if a film, although passed by the Régie, blatantly infringes the *Criminal Code*, *supra*, note 55: conversations with R. Payne, Chair of the Ontario Film Review Board, June 2, 1992, and F. Dionne, counsel for the Quebec Régie, June 8, 1992.

143 *Supra*, note 27.

144 Conversation with British Columbia Board employee, July 8, 1992. If the criteria are found to be identical to the criteria in the *Criminal Code*, *supra*, note 55, there may be problems as to its constitutional validity following the reasons of the majority in *McNeil*, *supra*, note 6.

Code provisions for films that have passed through the Board.[145] This is another way in which local standards are built into prosecutions of this kind.[146] However, this variance in the enforcement of these offences is the subject of criticism by some commentators in their submissions, made to the Commission in connection with this Report in which uneven enforcement and inconsistent court cases are seen to aggravate an already deficient system.

The issue of exposure to obscenity prosecution even if there has been compliance with the Board changes somewhat if we consider the possibility of removing the Board's censorship powers. The Board would become purely a classification and information providing body; the task of enforcing *obscenity* legislation would then be left to the proper enforcers of the criminal law—the police, the prosecutors, and the courts. Of course, the information pieces provided by the Board, in addition to the classifications accorded by it, may then serve as "flags" to both police and prosecutors. The

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145 It has been determined through a series of cases that the federal government has the power to prosecute federal offences, whether they depend on the criminal law power (see *The Attorney General of Canada v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206, 3 D.L.R. (4th) 16, and *R. v. Wetmore*, [1983] 2 S.C.R. 284, 2 D.L.R. (4th) 577) or upon some other area of federal law (see *R. v. Hauser*, [1979] 1 S.C.R. 984, 98 D.L.R. (3d) 193). However, in most instances Parliament has designated prosecutory authority to the provinces. For criminal offences, this delegation has occurred through the *Criminal Code*, *supra*, note 55, s. 2 of which as am. by R.S.C. 1985, c. 27 (1st Supp.), s. 2(1), states that "Attorney General" "with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which those proceedings are taken and includes his lawful deputy ...".

146 In Ontario, the police and prosecutorial functions are kept distinct; the former fall under the Ministry of the Solicitor General and the latter under the Ministry of the Attorney General. Ontario adopts a stance against pre-charge screening, so that prosecutors do not interfere with the police's decision to lay charges: see *Campbell v. Attorney-General of Ontario* (1987), 60 O.R. (2d) 617, 35 C.C.C. (3d) 480 (C.A.), aff'g (1987), 58 O.R. (2d) 209, at 213, 31 C.C.C. (3d) 289, at 292 (H.C.J.); leave to appeal to S.C.C. refused (1987), 60 O.R. (2d) 618*n*, 35 C.C.C. (3d) 480*n* (S.C.C.). This stance is not applied in New Brunswick, Quebec, and British Columbia: see Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Working Paper No. 62, 1990, at 69-70, 72. At 73, the Law Reform Commission of Canada recommends that police officers "should continue to have the ultimate right and duty to determine the form and content of charges to be laid in any particular case according to their best judgment and subject to the Crown's right to terminate the prosecution". A similar recommendation is found in the *Commissioner's Report* (Canada, Royal Commission on the Donald Marshall, Jr., Prosecution), Vol. 1 (1989), at 232. Prosecutors do, of course, retain discretion over post-charge action and may institute Crown directives to prosecutors to stay all charges of obscenity for films that have passed through the Board. A comparable situation occurred when the Attorney General issued a stay of prosecution regarding charges laid by the police against three doctors at the Morgentaler Clinic for performing abortions after the doctors had been acquitted by a jury and the case was before the Supreme Court of Canada: see *Campbell v. Attorney-General of Ontario*, *supra*. In obscenity cases, the Solicitor General could send a directive to the police, instructing them to give weight to the film board's approval. This might get into the constitutional problems referred to regarding the British Columbia Board in note 144, *supra*.

police may be more likely to lay charges based on a film for which the Board's warning states, for example, "includes sexual violence", than one for which the warning states, for example, "includes explicit consensual sex". This would allow for assistive, not mandatory, co-ordination and would remain within the valid constitutional parameters discussed above.

While the criminal law may not be a highly desirable or effective instrument for dealing with this kind of issue, suggestions for reform to the criminal law lie well beyond the purview of this Report. By confining ourselves to reform of the provincial Film Board, alone, we can at least aim at better distinguishing between the two kinds of regulatory mechanism, and minimizing the confusion that results from the interaction of the two processes.

3. CONCLUSIONS ON CONSTITUTIONAL ISSUES

Regulation of the classification and approval of films is a matter falling within provincial legislative competence. Extraprovincial impact of the work of these boards is incidental to valid provincial objectives and does not infringe on federal powers. National agreements on classifications would minimize expense, multiplication of effort, and consumer confusion. An initial move toward the institution of a national board would be facilitated in Ontario by legislation that permits the Ontario Board to adopt decisions of other provincial boards.

The Commission therefore recommends that the Ontario legislation be amended to permit the Board to accept the classifications of other provincial boards. Ontario should retain its Board as the final arbiter of all decisions.

There has been no conclusive determination as to whether the amendments to the *Theatres Act*[147] in 1984 are sufficiently detailed to warrant the conclusion that the limitations to freedom of expression for which that Act provides are now "prescribed by law". The Commission proceeds on the basis that the current regime would pass that test and be found to be constitutionally valid. Assuming the legislation is constitutionally valid, the Commission will consider in the remainder of this Report whether the decision to institute such a scheme is wise.

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147 See *supra*, note 65.

The Supreme Court of Canada decided in *R. v. Butler*[148] that the obscenity provision in the *Criminal Code*[149] infringes the *Charter* guarantee of free expression but is a reasonable limit demonstrably justifiable in a free and democratic society.[150] It interpreted the provision as restricting depictions of explicit sex with violence and explicit sex without violence that subjects people to degrading or dehumanizing treatment, but permitting explicit sex without violence that is neither degrading nor dehumanizing. Nor was the provision so vague as to violate the "prescribed by law" requirement in section 1 of the *Charter*. We know from this decision as well as the *Keegstra*[151] decision on hate propaganda that restrictions to freedom of expression will be permitted in our society where pressing and substantial harms will likely be avoided by this restriction. In deciding whether the legislation is to be enacted, legislatures are to be permitted a margin of appreciation within which to evaluate the social science evidence that is the basis for the conclusion that harm results.

If boards are to retain their powers of censorship, the problems that result from the federal/provincial overlap may be alleviated by agreements being reached between the boards and the police. In a criminal trial, one element to be considered is whether the film has passed through a provincial board;[152] however, this is no guarantee that a conviction will not result. On the other hand, if the board loses its censorship power completely, the evidence that a film has passed through a board will cease to be relevant in a criminal trial. Parties would continue to be subject to the obscenity provision of the criminal law, but would not have the illusion of being protected by prior provincial "approval". There would clearly be no guarantee of non-prosecution; involved persons would have to be aware of the standards of obscenity under the *Criminal Code* and comply with them.[153] However, parties would no longer be subject to two processes

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148 *Supra*, note 67.

149 *Supra*, note 55.

150 *Charter*, *supra*, note 1, ss. 2(*b*) and 1.

151 *R. v. Keegstra*, *supra*, note 68.

152 See the decision of Freedman C.J.M. in *R. v. Odeon Morton Theatres Ltd.*, *supra*, note 88. See, also, *R. v. Hawkins*, *supra*, note 118, in which the Chair of the Ontario Board was called as a witness. He stated that the film in issue would not have been banned or edited by the Board.

153 Compare the situation in Manitoba, where the Film Classification Board has only classification, not approval, powers. The Board issues a separate weekly video report for videos classified as "18 plus". The Board attaches a header to this list which reads as follows: "*Please Note*[:] The Board assigns classifications to films for the information of the public. *The Board does not censor. It does not interpret the Criminal Code*, which only the courts can do. As such video distributors and retailers should not consider a classification assigned by the Board as an implied endorsement of a film or video's legal status under the Criminal Code".

dictating what was and was not permissible, perhaps on the basis of different criteria. The existence of a film board would have nothing to do with the criminal law process; this is conceptually as well as practically a coherent position. This is not to say that the Commission endorses the use of the criminal obscenity provision as the most effective or desirable instrument for dealing with the regulation of pornography. Evaluation of the *Criminal Code* provision lies beyond the scope of this Report. In considering the powers of the Ontario Film Review Board in this regard, the Commission's aim is to reduce the confusion that results from the manner in which the two mechanisms currently interact.

4. ADMINISTRATIVE LAW

The Ontario Film Review Board is a statutory body that is empowered to exercise its discretion based on criteria set out in its enabling Act and regulations.[154] As noted earlier in this Report, it is a Schedule I agency[155] whose primary function is regulatory.[156] As an administrative agency, it is subject to certain constraints and stipulations set out in the large and evolving body of administrative law.

(a) Judicial Review

Perhaps because of the wide latitude for appeals provided for in the Act,[157] judicial review of Ontario Film Review Board decisions is generally

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154 See the *Theatres Act*, *supra*, note 49, and regulations, *supra*, note 66.

155 See Ontario, Management Board of Cabinet, *Directives*, Directive 6-2, Establishing and Scheduling of Agencies, at 6-2-6 (Appendix—Ontario Agencies). See *supra*, ch. 1, sec. 2.

156 The implications of the ascription of the title "Regulatory" may be more significant than simply comprising a designated nomenclature. Regulatory agencies have been described as those "boards" "'regulating the development and the conditions for carrying out some activity...supervising the operation of this activity and hearing representations of persons interested in such operations'. The regulatory function, therefore, often implies that in the responsible agency there be simultaneously a power to investigate and to hear, and also a power to adjudicate.... Essentially hybrid agencies, 'boards' bring together within one decision-making process the three methods by which the State acts—rule-making, adjudication and administrative enforcement": R. Dussault and L. Borgeat, *Administrative Law*[:] *A Treatise*, 2nd ed. (Toronto: Carswell, 1985), Vol. 1, at 126-27. However, the Ontario Film Review Board does not fit easily into any categories; it does not possess the vast powers of investigation and regulation typical of regulatory boards, yet to speak of it as a typical administrative agency for which hearings are appropriate also seems inaccurate.

157 *Theatres Act*, *supra*, note 49, ss. 33(8) and (9).

not sought.[158] Judicial review on the usual administrative law grounds is the only means available for review of decisions of classification, as these areprotected by a finality clause.[159] Judicial review of the Board's decisions would be available under the *Judicial Review Procedure Act*.[160] The provisions of that Act should thus govern judicial review applications that concern the Board.

Judicial review, which deals with the relationship between the courts and administrative agencies, is based on the premise that tribunals and individuals given the task of decision making are allowed to discharge only those responsibilities that are conferred upon them, either explicitly or implicitly, by legislation. The limit on the authority of a tribunal to make a decision is referred to as the agency's "jurisdiction"; "jurisdiction" is defined as authority to decide.[161]

Boards and agencies were given jurisdiction over certain matters to increase the efficacy of decision making; procedures less formal than the judicial process were intended to benefit those affected by the decisions made. Legislatures often include clauses in legislation governing tribunals to limit the intervention of the courts. As noted above, for example, the *Theatres Act* contains a finality clause with respect to the classification decision of the Board. That provision states:

> 33. —(6) A decision by a panel of the Board under subsection (5) as to classification is final.

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158 The court retains a discretion to refuse relief where alternative remedies, such as statutory appeals, are available. This will depend in part on the comparative convenience of judicial review and the alternative remedy. An appeal is considered an alternative remedy. See J.M. Evans, H.N. Janisch, D.J. Mullan, and R.C.B. Risk (eds.), *Administrative Law*[:] *Cases, Text, and Materials*, 3rd ed. (Toronto: Emond Montgomery, 1989), at 1053-54 (hereinafter referred to as "Evans *et al*"). See, also, *Harelkin v. The University of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 114.

159 Section 33(5) of the *Theatres Act*, *supra*, note 49, provides that a decision concerning classification or approval may be appealed by resubmission to a new panel of the Board. Section 33(6) then provides that a decision by a panel under s.s. (5) as to classification is final.

160 R.S.O. 1990, c. J.1. The Board's work is likely caught under both the definitions of "statutory power" and "statutory power of decision" contained in s. 1 of that Act. The fact that it is capable of statutory powers of decision would normally attract the provisions of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22; however, the Board's constitutive legislation expressly excludes the operation of that Act: see *Theatres Act*, *supra*, note 49, s. 3(11). The fact that the Board is exempt from the latter Act has no effect on judicial review; that is, it is still subject to judicial review.

161 S.A. de Smith, *Judicial Review of Administrative Action*, 4th ed. by J.M. Evans (London: Stevens & Sons, 1980), at 110; see, also, H.W.R. Wade, *Administrative Law*, 5th ed. (Oxford: Clarendon Press, 1982), at 39.

The courts' present attitude toward this clause can be deduced from two sources. First, the courts currently find themselves in a third stage in the evolution of curial approaches to judicial review, and their conduct should be predicted from a brief look at this context. Second, there has been a successful *appeal* of a Board decision in Ontario[162] which has some implications for the courts' attitude to judicial review of the Board.

As alluded to above, there has been an evolution of the law of judicial review in Canada that is generally seen as having passed through three main stages.[163] The stages differ in terms of judicial willingness to interfere with the decisions of administrative tribunals. The first stage, which lasted from the post-World War Two era until 1975,[164] was a period of judicial activism involving considerable intervention by courts in the decisions of administrative tribunals.[165]

The second stage lasted until 1984 and was characterized by the development of a policy of judicial deference to tribunal decision making and centred on *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*[166] In this case, Dickson J. set out the passage that was to form the basis on which judicial review decisions were made throughout the second stage. He asked:

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162 *Re Ontario Film & Video Appreciation Society and Ontario Film Review Board* (1986), 57 O.R. (2d) 339, 21 Admin. L.R. 169 (Div. Ct.) (hereinafter referred to as "*OFAVAS II*") (subsequent references are to 57 O.R. (2d)).

163 See Wilson J. in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.R. (4th) 449 (hereinafter referred to as "*National Corn Growers*"), and Cory J. in *Canada (Attorney-General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, 80 D.L.R. (4th) 520. See, also, P.J.J. Cavalluzzo, "The Rise and Fall of Judicial Deference", in N.R. Finkelstein and B.M. Rogers, *Recent Developments in Administrative Law* (Toronto: Carswell, 1987) 213; B.A. Langille, "Judicial Review, Judicial Revisionism and Judicial Responsibility" (1986), 17 R.G.D. 169; and D.J.M. Brown, "Privative Clauses", in Finkelstein and Rogers, *supra*, 53.

164 This classification uses *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, 41 D.L.R. (3d) 6 (hereinafter referred to as "*Nipawin*") (subsequent references are to [1975] 1 S.C.R.) to mark the end of the activist period and the inception of the era of judicial deference.

165 See, for example, *Jarvis v. Associated Medical Services Inc.*, [1964] S.C.R. 497, 44 D.L.R. (2d) 407; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425, 11 D.L.R. (3d) 336; and *Bell v. The Ontario Human Rights Commission*, [1971] S.C.R. 756, 18 D.L.R. (3d) 1.

166 [1979] 2 S.C.R. 227, at 237, 97 D.L.R. (3d) 417, at 425 (hereinafter referred to as "*CUPE*"). As noted above, this stage really began with the decision in the *Nipawin* case, *supra*, note 133, in which deference was deemed to be appropriate "if the Board acts in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear": *Nipawin*, *ibid.*, at 388-89, *per* Dickson J. The Court did, however, go on to list a significant number of errors the Board could make that would cause it to lose jurisdiction.

> Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

CUPE marked an era of judicial deference to the decisions of administrative tribunals; the attitude of the courts was to give weight to the expertise of tribunals and to interfere only in cases of egregious—or "patently unreasonable"—errors. Deference applied to finality as well as privative clauses.[167]

The deferential attitude has, however, recently come into question. Beginning in 1984 with the *CBC* case,[168] where the Court held that agencies' decisions regarding provisions that confer jurisdiction had to be correct, the Supreme Court has seemed more willing to review decisions of tribunals. The third stage is characterized by uncertainty and inconsistency as well as seeming increased willingness to interfere; the uncertainty is exemplified in the *Corn Growers* debate between Wilson J. and Gonthier J.[169] That debate centres on whether deference ought to be accorded to a tribunal if its *interpretation* of its constitutive legislation is not patently unreasonable[170] or only if its *conclusions* are not patently unreasonable.[171] The courts are purportedly attempting to adopt a "pragmatic and functional approach"[172] to the determination of when review is appropriate; however, the predictive value of the recent jurisprudence is very small.

The courts' approach to the *Theatres Act* finality clause can further be gleaned from the *OFAVAS II* case.[173] That case involved a judicial review

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167 *Re Ontario Public Service Employees Union and Forer* (1985), 52 O.R. (2d) 705 (C.A.), at 716 *et seq.*, referring to *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412, 14 D.L.R. (4th) 457 (hereinafter referred to as the "*CBC* case"); *Yellow Cab Ltd. v. Board of Industrial Relations*, [1980] 2 S.C.R. 761, 114 D.L.R. (3d) 427; and *Alberta Union of Provincial Employees on behalf of Branch 63, Edmonton Alberta v. The Board of Governors of Olds College, Olds, Alberta*, [1982] 1 S.C.R. 923, 136 D.L.R. (3d) 1.

168 *Supra*, note 167.

169 *National Corn Growers*, *supra*, note 163.

170 *Ibid.*, *per* Wilson J. (Lamer C.J. (at time of decision) and Dickson C.J. (at time of hearing) concurring).

171 *Ibid.*, *per* Gonthier J. (La Forest, L'Heureux-Dubé, and McLachlin JJ. concurring).

172 See *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 95 N.R. 161, and *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, 62 D.L.R. (4th) 437.

173 *Supra*, note 162. The Court did not deal with the issues of provincial competence to enact the legislation or the *Charter* issue, both of which were brought forth both under appeal and under judicial review.

application brought concurrently with an appeal,[174] when the Ontario Film Review Board had refused to approve the film "Amerika" for exhibition unless certain cuts of explicit sexual scenes were made. Saunders J., writing for the Court, noted that because the Board does not have to hold a hearing or give reasons for its decisions, the task of a court on appeal is a difficult one, and the Court effectively becomes a new panel of the Board.[175] This fact, coupled with a recognition of the "qualifications and experience" of Board members, led the Court to conclude that it should "only interfere with a decision of the Board if we consider that it has failed to perform its function under the Act and regulations or has made an unreasonable decision for which there is no basis".[176]

In the circumstances before the Court, while it was true that the impugned scenes contained explicit portrayals of sexual activity within the meaning of the regulations and while the Board members had qualifications and experience to make the decision, they "failed to take into account the general character and integrity of the film as [they were] required to do under the regulations".[177] The Court therefore rescinded the Board's decision and directed that the Board approve the film and classify it as "restricted".[178]

The Court granted the appeal and technically did not deal with the judicial review application. However, the language of the Court's decision reflected the curial approach to judicial review, as it referred to the unreasonable decision of the Board and its failure to take into account the considerations specified in its enabling legislation, in spite of the qualifications and experience of Board members.

Thus, given the *OFAVAS II* decision and the seemingly increased willingness on the part of the courts to intervene in decisions of administrative agencies, it must be concluded that courts may well interfere with classification decisions of the Board where they are unreasonable and

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174 Appeals are first made by submitting the film for reconsideration to a panel of at least five Board members: *Theatres Act*, *supra*, note 49, s. 33(5) and (7). This panel's decision on classification is final: *ibid.*, s. 33(6). Appeals as to approval may be made to the Divisional Court, where the Minister is entitled to be heard: *ibid.*, s. 33(8). That appeal can be on questions of law or fact or both; the Court may affirm or rescind the decision and direct the Board to take any action that the Board may take and that the Court considers proper: *ibid.*, s. 33(9).

175 *OFAVAS II, supra*, note 162, at 343.

176 *Ibid.*, at 343.

177 *Ibid.*, at 344.

178 *Ibid.*

where the Board acts in a manner not foreseen by the legislation. A finality clause does not give unlimited protection to decisions of the Board.

The question of judicial review is less relevant to the issue of approval and eliminations by the Board than to classification decisions. This is because decisions concerning approval or eliminations can be the subject of appeals to the Divisional Court on questions of fact or of law.[179] Because there is no privative or finality clause with respect to approval decisions, courts may scrutinize the correctness of a decision as well as its reasonableness.[180] However, the courts may refrain from correcting any error, depending on the intention of the Legislature as to the finality of the Board's decisions.[181] Courts may elect to defer to the expertise of specialized bodies.[182] A regulatory board may be subject to judicial review even if it affects a privilege and not a right.[183]

(b) Procedural Requirements

The distinction between judicial and administrative functions, formerly of crucial importance to a determination of whether a threshold was crossed requiring a body to act with certain procedural safeguards,[184] "no

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179 See *Theatres Act*, *supra*, note 49, s. 33(8) and (9). As noted above, the courts have discretion to refuse to allow judicial review applications where alternative remedies, such as appeals, exist. It is unlikely that judicial review instead of appeals of approval decisions would be sought, given the broad range of bases upon which an appeal can be launched. However, if judicial review were sought for these decisions, principles similar to those just discussed would apply.

180 Dussault and Borgeat, *supra*, note 156, Vol. 4, at 134.

181 With respect to the Ontario Film Review Board, the legislative intention could be interpreted in two ways. First, the fact that there is a finality clause for classification decisions could be interpreted as suggesting that the Legislature has faith in the expertise of the Board; there is no reason why this should not carry over to all of the Board's activities. On the other hand, the fact that a specific decision was made to protect classification decisions implies that an equally specific decision was made not to protect censorship decisions. No deference to the latter would therefore be warranted.

182 See, for example, the reasons of Estey J. (dissenting in part) in *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245, at 274-76, 99 D.L.R. (3d) 385, at 405-06. See, also, *Canadian Pacific Ltd. v. Canada Transport Commission* (1987), 79 N.R. 13 (Fed. C.A.), at 16-17. It should be noted that Wilson J. has described provincial boards as "tribunals with expertise at least on the community standard within their own province": *Towne Cinema Theatres Ltd. v. R.*, *supra*, note 75, at 530.

183 Dussault and Borgeat, *supra*, note 156, Vol. 1, at 128, and *nn.* 326, 327. See, also, *infra* this ch., notes 198-199 and accompanying text.

184 If the function were "judicial" or "quasi-judicial", the tribunal was required to observe the rules of natural justice. If the function were "administrative", the rules of natural justice did not apply to the tribunal or individual; in such a case, courts did not impose procedural duties. While of critical importance, the distinction between "judicial or quasi-judicial" and administrative was confusing, unclear, and often difficult to apply in practice.

longer – even formally – marks the threshold".[185] In recent years, the trend in administrative law appears to be a lowering of the threshold for a requirement of some sort of procedural fairness. However, a consequent widening of the kinds of procedures available to satisfy the requirement has occurred.[186]

Thus, decisions vary on procedural issues[187] including whether applicants are entitled to an oral hearing,[188] whether they may be represented by counsel,[189] the kind of disclosure to which they are entitled, what evidentiary rules are to govern,[190] and what type of procedures in terms of examination and cross-examination are to be afforded the applicant.[191] Some of these issues are resolved for some tribunals by the application of the *Statutory Powers Procedure Act*.[192] However, as noted

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Wade, at 450, stated that the argument goes round in a circle: "natural justice must be observed where the function is judicial; and the function is called judicial where natural justice ought to be observed".

185 Evans *et al.*, *supra*, note 158, at 38. In terms of the *Charter*'s s. 7, the threshold is a deprivation of "life, liberty and security of the person"; if such a deprivation occurs, the principles of fundamental justice must be adhered to: *ibid.* Fundamental justice has been interpreted to be broader than natural justice: see *Reference re Section 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, at 504, 24 D.L.R. (4th) 536, at 550. It has been noted above that s. 2(*b*) and not s. 7 of the *Charter* is the provision likely to be used for challenges under the *Theatres Act*: see *supra*, note 56. For this reason, an extensive discussion of s. 7 and its administrative procedural requirements will not occur here.

186 Evans, *et al.*, *supra*, note 158, at 127.

187 The other component of natural justice is the rule against bias: in making decisions, tribunals should be impartial and disinterested. This branch of natural justice is not of relevance to this Report.

188 An oral hearing may be expected, but there are circumstances in which it is sufficient that a person be permitted to make written submissions to the tribunal or individual making the decision. See, for example, *Hoffman-La Roche Ltd. v. Delmar Chemicals Ltd.*, [1965] S.C.R. 575, 50 D.L.R. (2d) 607. See, also, de Smith, *supra*, note 161, at 201-02 and *n.* 17, and D. Mullan, "Unfairness in Administrative Processes[:] The Impact of Nicholson and the Charter of Rights", [1983] Pitblado Lect. 68, at 72.

189 There is no general right to instruct counsel implied by the rules of natural justice, even though in a particular situation a person may be granted this right: Mullan, *ibid.*, at 71-72, referring to *Ex parte Patterson* (1971), 18 D.L.R. 84 (B.C.S.C.).

190 The rules of natural justice do not necessarily require that the rules of evidence be observed. Compare s. 15 of the *Statutory Powers Procedure Act*, *supra*, note 160.

191 There is no general right to cross-examine witnesses, although in certain circumstances refusing cross-examination may be found to be a denial of a fair hearing. See, for example, *Re Tandy Electronics Ltd. and United Steel Workers of America* (1979), 26 O.R. (2d) 68, 102 D.L.R. (3d) 126 (Div. Ct.); *Township of Innisfil v. Township of Vespra*, [1981] 2 S.C.R. 145, 123 D.L.R. (3d) 530; and *Re B and Catholic Children's Aid Society of Metropolitan Toronto* (1987), 59 O.R. (2d) 417, 38 D.L.R. (4th) 106 (Div. Ct.).

192 *Supra*, note 160.

above,[193] the *Theatres Act*[194] expressly provides that Part I of the *Statutory Powers Procedure Act*, which establishes minimum procedural requirements, does not apply to decisions made by the Board.

The content of the fair hearing rule is neither fixed nor certain. The basic theme animating the requirement is that persons should know the case they must meet and should have a fair opportunity to present their side. The classic statement of the right to be heard was given by the House of Lords in *Board of Education v. Rice*:[195]

> [T]he Board of Education will have to ascertain the law and also to ascertain the facts.... [I]n doing either they must act in good faith and listen fairly to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

Until relatively recently, tribunals and individuals whose function was not classified as "judicial" or "quasi-judicial" but as "administrative" were not subject to the rules of natural justice and thus were not bound to afford procedural protections to persons affected by their actions. In 1978, however, in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*,[196] the Supreme Court of Canada concluded that, even though a tribunal was not required to grant a person a formal hearing, it was nevertheless under a common law duty of fairness in the exercise of an administrative function involving wide discretion. This important decision marked the acceptance in Canada of what has come to be called the "doctrine of fairness".[197]

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193 *Supra*, note 160.

194 *Supra*, note 49, s. 3(11).

195 [1911] A.C. 179, at 182, [1911-13] All E.R. Rep. 36, at 38.

196 [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671.

197 In England, courts earlier accepted the notion that a common law duty of fairness rested on administrative tribunals and other individuals who did not fall into the traditional judicial or quasi-judicial classification: see, for example, *Official Solicitor v. K*, [1965] A.C. 201, [1963] 3 All E.R. 191 (H.L.); *R. v. Gaming Board for Great Britain*, [1970] 2 Q.B. 417, [1970] 2 All E.R. 528 (C.A.); and *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12, [1975] 1 W.L.R. 1686 (C.A.). The changes began with *Ridge v. Baldwin*, [1964] A.C. 40, [1963] 2 All E.R. 66 (H.L.). The advent and development of fairness has generated a wealth of commentary. See, for example, J.H. Grey and L.-M. Casgrain, "Jurisdiction, Fairness and Reasonableness" (1987), 10 Dalhousie L.J. (No. 3) 89; M. Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" (1978), 28 U. Toronto L.J. 215; R.A. Macdonald, "Judicial Review and Procedural Fairness in Administrative Law: I" (1980), 25 McGill L.J. 520; R.A. Macdonald, "Judicial Review and Procedural Fairness in Administrative Law: II" (1980), 26 McGill L.J. 1;

In 1985, the Supreme Court of Canada stated that "there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual".[198] Thus, even if the Board is regulatory in nature, it must be fair. Further, it no longer matters whether the agency is dealing with a right, a privilege, or an interest; each one of these engages the principle of fairness.[199]

As with the concept of natural justice, the procedural content of fairness is fluid, with the individual procedural protections dependent on the particular circumstances. The Supreme Court of Canada has stated that "[f]airness is a flexible concept and its content varies depending on the nature of the inquiry and the consequences for the individual involved".[200] At the very least, fairness would require that a person be given a fair opportunity to meet the arguments and evidence mustered against her.[201]

While some courts have tended to regard natural justice and fairness as distinct, Dickson J., in his concurring reasons in *Martineau v. Matsqui Institution Disciplinary Board*,[202] indicated his opposition to this approach:

> In general, courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between a duty to act fairly, and a duty to act

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D. Mullan, *supra*, note 188; D. Mullan, "Natural Justice —TheChallenges of *Nicholson*, Deference Theory and the *Charter*", in Finkelstein and Rogers, *supra*, note 163, 1; A.J. Roman, "Legal Constraints On Regulatory Tribunals: Vires, Natural Justice And Fairness" (1983), 9 Queen's L.J. 35; and E. Tucker, "The Political Economy of Administrative Fairness: A Preliminary Enquiry" (1987), 25 Osgoode Hall L.J. 555.

198 *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at 653, 24 D.L.R. (4th) 44, at 51-52. Similarly, it has been stated that *certiorari* is available with respect to "any public body with power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person": *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602 at 628, 106 D.L.R. (3d) 385, at 410 (subsequent references are to [1980] 1 S.C.R.), *per* Dickson J.

199 Whether the interest at stake in having a film shown in its original version, and receiving an acceptable classification for it, is determined to be a right, interest, or privilege may ultimately have some effect on the amount and kinds of procedural protections that are to be accorded by the Board. Such a characterization has not yet been made by the courts. This chapter proceeds on the basis that rights, interests, and privileges each engage the duty of fairness, and assesses the procedures used by the Board in relation to the significance of the decision on the affected party.

200 *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, at 231, 41 D.L.R. (4th) 429, at 466. See, also, J.M. Evans, "Remedies in Administrative Law", in *Special Lectures of the Law Society of Upper Canada*[:] *New Developments in the Law of Remedies* (1981) 429, at 434, which sets out another list of factors.

201 For a statement of what the duty of "fairness" requires, see *Apotex Inc. v. Ontario (Minister of Health)* (1989), 71 O.R. (2d) 525 (Div. Ct.), at 533.

202 *Supra*, note 198, at 629-30.

> in accordance with the rules of natural justice, yields an unwieldy conceptual framework.
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> It is wrong, in my view, to regard natural justice and fairness as distinct and separate standards and to seek to define the procedural content of each.

Natural justice and fairness can best be viewed as ends of a continuum of procedural protection; there is no clear demarcation between them.[203]

Courts have held that procedural fairness is required even in the face of legislation that expressly excludes the applicability of the *Statutory Powers Procedures Act*.[204]

As noted above, the procedural provisions under the *Theatres Act*[205] are quite elaborate and provide many opportunities for decisions to be reconsidered. As pointed out in chapter 1 of this Report, where decisions of a panel of three are not unanimous, the dissenting member of the panel may request the Chair to have the film reviewed by a new panel of four members. A cumulative vote is then taken, with the majority of the seven votes determining the outcome. Next, a distributor who is unsatisfied with a Board's decision may appeal that decision to a new panel of the Board[206] composed of at least five members.[207] In these appeals, the decision of the second panel rules; the first panel's decision is disregarded. An appeal on approval decisions may then be taken to Divisional Court.[208]

As well, Summary Reports are filled out for each film that is viewed. These Reports explain why films receive the classifications they do; copies of the Reports are on file at the Film Review Board Offices and are given to the distributor and to the Ministry of Consumer and Commercial Relations.

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203 Evans, *supra*, note 200, at 434, and Mullan, *supra*, note 188, at 71-72.

204 *Supra*, note 160. *Re Downing and Graydon* (1978), 21 O.R. (2d) 292, 92 D.L.R. (3d) 355 (C.A.); *Re Abel and Advisory Review Board*, (1980), 31 OR. (2d) 520, 119 D.L.R. (3d) 101 (C.A.); and *Re Collins and Pension Commission of Ontario* (1986), 56 O.R. (2d) 274, 31 D.L.R. (4th) 86 (Div. Ct.).

205 *Supra*, note 49.

206 *Ibid.*, s. 33(5).

207 *Ibid.*, s. 33(7). In the meantime, distributors may release the film at the original classification given by the Board. If the appeal is successful, the new classification can replace the initial one as soon as the appeal decision is made: conversation with A. Coleclough, Director, Theatres Branch, July 10, 1992.

208 *Theatres Act*, *supra*, note 49, s. 33(8) and (9).

While there is no common law duty of agencies to give reasons for decisions,[209] and regulatory boards are "often not required to provide reasons for their decisions",[210] many arguments can be made in favour of such a rule. These include forcing the panel to formulate carefully its reasons for decisions, encouraging the Board to develop consistency in its reasons, and increasing public confidence in the Board. Further, it will assist decision makers on hearings *de novo* or appeals.[211] The greater the amount of detail given in the Report, the more assistance the Report will be to the public and to a reviewing body.[212]

These Reports satisfy many of the arguments in favour of a duty to give reasons, and their use should be maintained. Further, the Commission recommends that the information contained in the Summary Reports should be made readily available to members of the public by, for example, being kept in public libraries, or by other means such as the use of an automated telephone information system.

Thus, given the kinds of decisions being made, the effect of these decisions on distributors, the Summary Reports, and the ample opportunities for reviews and appeals, it is unlikely that the workings of the Board violate the level of procedural fairness required by an administrative tribunal of its kind.[213] Such protection is built into the *Theatres Act* by the ample opportunities for review *de novo* and appeal.

A further issue regarding the rules of natural justice may be seen to arise from the policy committee of the Board. This is a committee composed of seven members of the Board, elected by their peers, who then take all decisions before a full complement of the Board for approval. The

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209 See, for example, *Re Glendenning Motorways, Inc. and Royal Transportation Ltd.* (1975), 59 D.L.R. (3d) 89 (Man. C.A.); *Re Gal Cab Investments Ltd. and Liquor Licensing Board*, [1987] N.W.T.R. 100, 34 D.L.R. (4th) 363 (C.A.); *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219, at 233, 43 D.L.R. (4th) 1, at 11.

210 Dussault and Borgeat, *supra*, note 156, Vol. 1, at 132.

211 See, for example, Evans *et al.*, *supra*, note 158, at 309-10; arguments against a rule requiring decisions to be issued are set out at 311. Compare the words of Laskin C.J. in dissent in the *McNeil* decision, *supra*, note 6, set out in text accompanying note 21, *supra*.

212 Note, however, the statement of the Court in *OFAVAS II*, *supra*, note 162, at 343, that the Court's task on appeal was rendered more difficult by the lack of reasons from the Board. The Court stated this even though it was in possession of a Summary Report.

213 Any errors in the initial panel hearing could be cured by the hearing *de novo* of a newly constituted panel, and possibly by the appeal to Divisional Court. See *Re Putnoki and Public Service Grievance Board* (1975), 7 O.R. (2d) 621, 56 D.L.R. (3d) 197 (Div. Ct.); leave to appeal to C.A. refused (1975), 7 O.R. (2d) 621*n*, 56 D.L.R. (3d) 197*n* (C.A.); *King v. The University of Saskatchewan*, [1969] S.C.R. 678, 6 D.L.R. (3d) 120; and *Harelkin v. The University of Regina*, *supra*, note 158. See, also, Evans *et al.*, *supra*, note 158, at 352 *et seq.*

arrangement is somewhat similar to – with differences that render it even less problematic than – the situation that arose in the *Consolidated Bathurst* case.[214]

In that case, a full Board discussion was convened to discuss the policy implications of a certain decision before that decision was rendered. The appellant contended that this breached the rule of natural justice that "he who decides must hear". However, a majority of the Supreme Court of Canada[215] held that such a meeting was permissible. A distinction could be drawn between discussions regarding the facts of the case and discussions about broader legal or policy issues.[216] "Policy issues must be approached in a different manner because they have, by definition, an impact which goes beyond the resolution of the dispute between the parties".[217] Full meetings allow the Board to benefit from the experience of all members[218] and to encourage consistency in decision making of a large tribunal that sits in panels.[219] The balances achieved by the process used was acceptable, and the meeting did not infringe the rules of natural justice.

In the course of rendering his decision, Gonthier J. noted for the majority that[220]

> the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the Board to abide strictly by the rules applicable to courts of law.

Procedures must be permitted to be flexible if administrative tribunals are to fulfil their function within institutional frameworks. They decide many cases in a forum that is more accessible and less formal than that of courts and must be permitted latitude in determining their procedures if they are to carry out their mandate successfully. Policy meetings of an elected group of the Board which then takes the decisions before the full Board achieve the positive goals set out in *IWA v. Consolidated Bathurst Packaging Ltd.* without going so far as to violate the "she who hears must decide" rule. The fact that

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214 *IWA v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, 68 D.L.R. (4th) 524 (subsequent references are to [1990] 1 S.C.R.).

215 *Ibid.*, Sopinka and Lamer JJ. dissenting.

216 *Ibid.*, at 335.

217 *Ibid.*, at 337.

218 *Ibid.*, at 326.

219 *Ibid.*, at 327-28.

220 *Ibid.*, at 323. See, also, *ibid.*, at 340.

these meetings occur before specific decisions are taken, as opposed to after a "hearing" and before a decision, does not alter the fact that positive benefits are derived from policy meetings. It does, however, raise the issue of fettering discretion.

(c) Fettering Discretion

There is a tension in administrative law between a rule against fettering discretion and a desire for some confining and structuring of the exercise of discretion. Structured discretion leads to predictability and consistency of decisions, and for this reason should be encouraged. However, equally important is the rule that "[a] body entrusted with a discretion must not disable itself from exercising its discretion in individual cases by adopting a fixed rule of policy".[221] Generally, broad policy decisions are encouraged as long as room is left for deviation where exceptional circumstances warrant different treatment.[222] Further, these policy decisions should be arrived at through open consultation processes;[223] directives should not be handed down from above. In the case of the Ontario Film Review Board, policy decisions are made taking into account the variety of feedback and information the Board receives from the community. Thus, as long as the policy guidelines are not slavishly followed, but are applied differently where particular reasons or context so warrant, the development of these guidelines in consultation with the community and other interested parties should be encouraged. If an instance arises in which guidelines are followed so rigidly that specific circumstances are not taken into account, the decision would be open to review on the grounds that discretion has been fettered.

5. THE ADMINISTRATIVE LAW/*CHARTER* OVERLAP

(a) Application of the *Charter*

In the discussion of the *Charter* above, the application of that instrument was not a contentious issue because the challenge was directed at a piece of legislation. That the *Charter*[224] applies to legislation is not

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221 Evans, *et al.*, *supra*, note 158, at 685.

222 *The King v. Port of London Authority*, [1919] 1 K.B. 176 (C.A.), at 184. Nor may there be conduct that amounts to a refusal to exercise jurisdiction: *ibid.*, at 183. See, also, *Gregson v. National Parole Board*, [1983] 1 F.C. 573, 1 C.C.C. (3d) 13 (T.D.).

223 *Capitol Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at 171, 81 D.L.R. (3d) 609, at 629.

224 *Supra*, note 1.

controversial.[225] Does the *Charter* apply to the *decisions* of the Ontario Film Review Board? While the *OFAVAS I*[226] case considered a challenge both to the legislation and to the "standards and procedures of the board",[227] the judgments did not consider the application issue; the *Charter* was assumed to apply to both legislation and standards and procedures. We turn to a brief consideration of the application of the *Charter* to decisions of the Board.

The position of the Board in this regard is not unlike that of the adjudicator in *Slaight Communications Inc. v. Davidson*.[228] The Court in that case found that the *Charter* applied to orders of an adjudicator, as the "adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives *all* his powers from the statute".[229]

In the jurisprudence concerning the application of the *Charter* that has emerged since *Slaight*, the test for *Charter* applicability has become more complicated than merely determining whether a body is a statutory creature. Indeed, in the *McKinney* tetralogy,[230] central to subsequent determinations of whether the *Charter* applies, La Forest J. explicitly stated for the majority that the fact that an institution is a creature of statute is not a sufficient reason to invoke *Charter* application. Rather, many factors had to be considered: Does the entity have a public or private purpose?[231] What is the relationship between the entity and the government in terms of government control? How independent is the institution? In *Stoffman v. Vancouver General Hospital*,[232] the majority reiterated the position held since *RWDSU v. Dolphin Delivery Ltd.*[233] that the *Charter* will apply to subordinate bodies supervised, created, or supported by the government.

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225 See, for example, *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513, at 521, 26 D.L.R. (4th) 728, at 736 (C.A.); leave to appeal to S.C.C. refused (1986), 72 N.R. 76*n*, 21 C.R.R. 44*n* (S.C.C.).

226 *Supra*, note 57.

227 *Ibid.*, at 586.

228 [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416 (hereinafter referred to as "referred to as "*Slaight Communications*") (subsequent references are to [1989] 1 S.C.R.), discussed further *infra*.

229 *Ibid.*, at 1077-78.

230 *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, 76 D.L.R. (4th) 700; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, 77 D.L.R. (4th) 55; and *Douglas/Kwantlen Faculty Assn. v. Douglas College*,[1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94.

231 The majority thereby excluded private corporations, which would have been caught by a mere "creature of statute test".

232 *Supra*, note 230.

233 [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

Important in the tetralogy and the subsequent *Lavigne* decision[234] was the issue of control; where government control over routine matters is substantial, the *Charter* is held to apply.

From an analysis of *RWDSU v. Dolphin Delivery Ltd., Slaight Communications*, and the tetralogy, it is clear that the *Charter* would be found to apply to the Ontario Film Review Board and its decisions. The Board is merely a subordinate government body, composed of government appointees and governed quite substantially by the Act and regulations, which is set up to further the aims of the government. The position of the Board is similar to that of the adjudicator in *Slaight Communications*. If the *Charter* were held not to apply to bodies such as these, it would be an easy task for governments to circumvent their constitutional responsibilities; they would merely have to establish subordinate bodies one step removed from the government itself to carry out the desired function.

Once it is determined that the *Charter* applies to the Board, it must also apply to its decisions as they are simply exercises of the Board's discretion. As Lamer J. stated in *Slaight Communications*:[235]

> [I]t is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied.... Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so.

Where legislation confers, expressly or impliedly, the power to infringe a guaranteed right, that legislation must be subject to a section 1 test. If the legislation confers an imprecise discretion but does not confer the power to limit *Charter* rights, the order made by the tribunal must then be subject to a section 1 test. If it is not justified under section 1, the board has exceeded its jurisdiction; if it is justified under section 1, the tribunal or board has acted within its jurisdiction.[236]

Thus, if particular orders of the Ontario Film Review Board infringe a *Charter* guarantee such as freedom of expression, which orders requiring the elimination of scenes from films would certainly do, the individual orders

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234 *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, 81 D.L.R. (4th) 545.

235 *Slaight, supra*, note 228, at 1078, *per* Lamer J., dissenting in part but writing for the majority on this point.

236 *Ibid.*, at 1080.

would have to be subject to a section 1 test. Certainly, it would be open to any applicant to challenge particular decisions of the Board on this basis. However, for the purposes of this Report, we will consider these Board decisions insofar as they could be justified as constitutional, and will proceed to consider whether it is wise to permit such decisions to be made at all.

(b) The Reasonableness Requirement

The case of *Slaight Communications Inc. v. Davidson*[237] considers another issue that is relevant to the Board's exercise of its discretion – the relationship of reasonableness in administrative law and reasonable limitations under section 1 of the *Charter*.[238] Lamer J. dissented in part, but the majority was "in complete agreement with his discussion of the applicability of the *Charter* to administrative decision-making".[239] Lamer J. held that the fact that part of the adjudicator's order in issue in that case "is not unreasonable from an administrative law standpoint does not mean that it is necessarily consistent with the *Charter*".[240] Thus, where both administrative law principles and the *Charter* are involved, the reasonableness requirements imposed by each body of law must be satisfied.

6. CONCLUSIONS ON ADMINISTRATIVE LAW ISSUE

The Ontario Film Review Board, as an administrative agency, is subject to the broad constraints encompassed under the rubric of administrative law. While its decisions are subject to judicial review, that procedure is most relevant to its classification decisions, which are protected by a finality clause. Decisions concerning censorship and approval may be appealed to the Divisional Court on grounds of fact or law, and this is the process most likely to be followed for decisions of that kind. Judicial review procedures will be governed by the *Judicial Review Procedure Act*.[241]

The Board must operate within the confines of the duty of fairness. This does not, of course, mean that the Board must institute trial-like procedures. In fact, its procedures are in accordance with the underlying

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237 *Ibid.*

238 *Supra*, note 1.

239 *Slaight Communications*, *supra*, note 228, at 1048, *per* Dickson C.J.

240 *Ibid.*, at 1077. Dickson C.J. explicitly noted, at 1049: "A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review".

241 *Supra*, note 160.

principle of fairness, that is, that the applicant must know the case she must meet and be afforded an opportunity to present her side. The Commission is of the opinion that the procedures adopted by the Board satisfy the fairness requirements imposed by administrative law.

The Commission is also of the opinion that the *Charter* applies to decisions of the Board. However, as noted above,[242] the Commission proceeds in this Report under the presumption that the orders are constitutional; it is the wisdom and not the constitutionality of the cuts with which we are concerned.

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242 See *supra*, this ch., sec. 2(b)(i)(a).

CHAPTER 4

FOCUS ON THE FILM REVIEW BOARD; EVALUATION OF ITS POWERS

1. THE BOARD'S POWERS OF CLASSIFICATION AND APPROVAL

As noted in chapter 1 of this Report, the Ontario Film Review Board's powers of classification and approval exist pursuant to a combination of legislation, regulations, and the Board's own discretion. We now turn to a more detailed analysis of what those powers look like in practice.

(a) The Power To Classify

The purpose of the classification power is primarily informative. Its importance lies in guiding parents to determine what they wish their children to view[1] and informing adult viewers of the content of films. Classification systems vary amongst the provinces. All provinces have more than one category;[2] every province except British Columbia has one category that excludes children under the age of eighteen, regardless of whether they are accompanied by an adult.[3]

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[1] J. Valenti, *The Voluntary Movie Rating System* (Motion Picture Association of America, Inc., 1991), at 4. See, also, B.A. Austin, "G—PG—R—X: The Purpose, Promise and Performance of the Movie Rating System" (1982), 12 J. Arts Management & L. 51, at 53.

[2] The Atlantic provinces use three categories; Manitoba and British Columbia use four categories with an additional one applicable to videos only; Ontario, Alberta, Saskatchewan, and Quebec use four classifications.

[3] In Manitoba, when *The Amusements Act*, R.S.M. 1987, c. A70 (also CCSM, c. A70) was amended in 1972, one of the changes was to the category that restricted films to viewers over eighteen (s. 28.1 as en. by S.M. 1972, c. 74, s. 4). The previous Act had permitted parents to take their children to any film; there was no category that absolutely restricted the attendance of children. For some members of the Legislature, this 1972 change was regrettable as it constituted a move toward increased censorship; their opinion was that parents should be able to have complete discretion over what their children view: see Manitoba, Legislative Assembly, *Debates and Proceedings*, July 4, 1972, at 3682 (debates on Bill 70). Manitoba now has a "Restricted" category, where children under eighteen cannot view films even if accompanied by a parent. The "Restricted Plus" category, where children under 18 are prohibited, applies to videos only. In British Columbia, the most severe restriction assigned to films shown in theatres is "Restricted", which permits viewers under eighteen to attend if accompanied by an adult. The "Adult" category, which completely excludes those under eighteen, applies to videos only.

Section 3(7)(d) of the *Theatres Act*[4] gives the Ontario Board the power to classify films in accordance with the classifications set out in section 3(9); those classifications comprise four categories.[5] Section 3(10) sets out the ages suitable for viewing the various classifications of films.[6] Section 3(7) of the Act grants several powers to the Board, including the authority to prohibit the display of any film in Ontario.[7] However, this designation is used sparingly; it was accorded to one film out of 248 reviewed by the Board in January 1992, one out of 178 in February 1992, and two out of 213 in March 1992.

The regulations are marginally relevant to the classification function of the Board. Section 11 of the regulations[8] governs the kind of notice of the classification of a film that must be displayed at theatres. Section 14(1) provides that in exercising its authority under the provisions of the Act that govern classification and approval, "the Board shall consider the film in its entirety and take into account the general character and integrity of the film". The specific delineation of what is acceptable for each category, however, is contained in the classification guidelines written and published by the Board itself.[9]

The "family" classification is accorded to films "that the Board considers appropriate for viewing by a person of any age".[10] The Board's guidelines stipulate that these films should contain, at most, only "occasional use of words such as: darn, damn, hell"[11] and no coarser language. As well, portrayals of violence should be limited to "restrained, non-graphic portrayal of: armed combat, natural disaster-accidents, hand-to-hand combat, bloodletting".[12] There should be only "casual, non-sexual nudity with no close-ups"[13] and sexual activity is confined to "limited embracing, kissing (in

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4 R.S.O. 1990, c. T.6.

5 See *supra*, ch. 1.

6 The details of this are set out *supra*, ch. 1.

7 Compare s. 14(2) of the Regulation under the *Theatres Act*, O. Reg. 487/88.

8 *Ibid.*

9 See Ontario Film Review Board, *Classification Guidelines* (June 28, 1990) (hereinafter referred to as "*Guidelines*"). See *supra*, ch. 1, notes 51-52 and accompanying text. The categories are also explained in a pamphlet issued by the Ontario Film Review Board entitled *Classification System*.

10 *Theatres Act*, *supra*, note 4, s. 3(10)(a).

11 *Guidelines*, *supra*, note 9.

12 *Ibid.*

13 *Ibid.*

loving context)".[14] There is to be no horror, and "no glorification of anti-family and anti-social values".[15] No adult accompaniment is required for these films.[16]

Films that are labelled "parental guidance" are open to all persons. This classification serves as a warning to parents to exercise discretion in permitting their children to view the film; "while unaccompanied children will be admitted to the theatre, the contents may not be suitable for all children".[17] These films may contain the "occasional use of mild expletives such as: God, bastard, shit, piss, fuck".[18] The violence may include a "restrained portrayal of non-graphic violence – limited bloodletting integral to plot" and be "non-prolonged – no close-up". There may be "brief nudity in a non-sexual context – non-exploitive close-up" and sexual activity that involves "limited embracing, kissing (in loving context)". The film is restricted to showing "comedic" horror and it must not promote anti-family or anti-social values; the Board should consider the "manner of treatment of these values".[19]

"Adult accompaniment" films may be viewed by children fourteen or over without an adult; children under fourteen will only be admitted if an adult accompanies them. This classification also serves as a warning to parents; these films are "not recommended for most younger children but the final decision is left to the parent".[20] The films may include coarse language, for which an "information piece" is recommended; they may depict "violent prolonged hand-to-hand combat resulting in tissue damage", "violent sports, bloodletting, murder, non-graphic detail".[21] Distance shots of full but non-detailed frontal nudity are permitted, as are casual non-close-ups, "kissing, petting, fondling", and "implied sexual activity". There may be brief scenes of horror, but the "film should not encourage and/or glamourize alcohol [or] drug use or violence". The guidelines further provide that

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14 *Ibid.*

15 *Ibid.*

16 But see ss. 19(1) and (2) of the *Theatres Act*, *supra*, note 4, which set out conditions that must be met for persons under twelve to attend cinemas.

17 *The Classification System*, *supra*, note 9.

18 *Guidelines*, *supra*, note 9.

19 *Ibid.*

20 *Classification System*, *supra*, note 9.

21 Guidelines, *supra*, note 9.

"[s]ubject matter of an extreme nature with social or documentary significance could be considered for inclusion in this classification".[22]

Finally, films classified as "restricted" may be viewed only by persons eighteen years of age or older. There is no restriction on the language that can be used in these films; "graphic portrayals of violence, torture, abuse, horror, extreme bloodletting, sexual violence integral to the plot" will be permitted. These films may include depictions of "simulated sexual activity", graphic horror, and subject-matter that "may include extreme psychological impact".[23]

As can be seen, the provinces do not differ widely on how classifications are delineated.[24] The Commission has recommended, in chapter 3 of this Report, that the Ontario legislation be amended to permit the Board to adopt the classifications of other provincial boards, thus moving to a permissive national classification system. In order to facilitate such a system, the Commission further recommends that Ontario work with the other provinces to develop, by agreement, one uniform set of classification categories with guidelines. It is the Commission's view that, in developing classification categories, boards and legislators are entitled to rely on the proposition that information will lead to the careful exercise of parental or other adult discretion. Thus, categories that serve as warnings to parents but permit them ultimate decision making authority are reasonable. The Commission endorses those classification systems that have four or five categories rather than three, as greater delineation inherently provides more information.

In order to make the classification system meaningful, the Act provides that no person shall sell a ticket[25] or admit[26] to any film that is classified "adult accompaniment" a person under the age of fourteen years who is not accompanied by an adult. Nor shall any person knowingly allow a person under fourteen to remain in a theatre where such a film is being shown.[27] Similar restrictions apply to restricted films, to which no person under

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22 *Ibid.*

23 *Ibid.*

24 For instance, all provinces use the ages of fourteen and eighteen to separate audiences; all provinces other than British Columbia exclude those under eighteen from some films; all provinces have one category that indicates approval for all audiences. Within these parameters, it should not be difficult for the provinces to agree upon specific categories.

25 *Theatres Act*, *supra*, note 4, s. 19(3)(a).

26 *Ibid.*, s. 19(3)(b).

27 *Ibid.*, s. 19(3)(c).

eighteen is to be sold a ticket,[28] admitted,[29] or be knowingly permitted to remain in a theatre where the film is being shown.[30] These provisions do not apply where the person selling the ticket or permitting admission "has received satisfactory evidence that the person in question is the required age or older".[31]

However, similar provisions applicable to video retailers are limited.[32] Section 47(1) of the Act reads as follows:

> 47.—(1) No film exchange or agent or employee thereof shall distribute a film classified as 'restricted' to any person apparently under the age of eighteen years.

"Film exchange" is defined in section 1 of the Act to mean "the business of distributing film", and "distribute" is defined as "distribute for direct or indirect gain and includes rent, lease and sell".[33] The Act therefore covers the distribution of restricted videos but does not contain more specific provisions addressing the distribution of videos of other classifications that restrict admission by age. Indeed, as the system currently operates, specific provisions for video retailers would be cumbersome. That is, videos in Ontario do not carry a mark showing that they have passed through the Film Review Board and displaying the classification accorded to them by the Board. Rather, Ontario now uses a catalogue system for videos: video stores are required to keep a catalogue showing the classifications of all films at their counters.[34] However, there are often delays in updating these catalogues, rendering the information inaccessible to both consumers and video retailers. The catalogue system is cumbersome and always out of date. Further, it is difficult to ascertain whether a video has passed through the

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28 *Ibid.*, s. 19(4)(a).

29 *Ibid.*, s. 19(4)(b).

30 *Ibid.*, s. 19(4)(c).

31 *Ibid.*, s. 19(5).

32 Such restrictions have recently been introduced into the Quebec legislation: see *Cinema Act*, R.S.Q., c. C-18.1, s. 86.2, as en. by S.Q. 1991, c. 21, s. 15. Although "film" in the Ontario *Theatres Act*, *supra*, note 4, s. 1, is defined to include videotape, the provisions restricting the selling of tickets and admission to theatres apply conceptually to films in cinemas; the language refers to the exhibition of films in theatres. The specifics of renting, selling, or lending that would apply to videotapes is not presently included in the legislation, aside from s. 47(1).

33 *Theatres Act*, *ibid.*

34 "*National Classification*[:] *Discussion Paper and Background Study on Film Classification in Canada*", information for Film and Video National Classification Symposium (Toronto: April 3, 1992) (submitted to Provincial Deputy Ministers responsible for film and video classification), at 20.

Board.[35] Classifications that are visible on video boxes are often American ratings, increasing the confusion of the consumer.

The Commission therefore recommends that a sticker system, such as that now in use in Quebec,[36] be instituted so that the classification accorded each videofilm is clearly displayed on the video box and on the video cassette itself.[37] Illegal videos, that have not gone through the Ontario Film Review Board even though they are required to do so by legislation,[38] will then be readily identifiable to both inspectors under the Act,[39] and to consumers. Further, amendments to the legislation prohibiting anyone from renting, selling, or lending films to persons under the age required by the classification would be rendered workable by the introduction of such a system.[40]

The Commission therefore recommends that the *Theatres Act* be amended to incorporate provisions that prohibit videos from being rented, sold, or loaned to any person of an age excluded by the classification accorded to that video.

The Commission further recommends the adoption of legislative provisions regarding the practice of showing videos or clips from videos on in-house television screens on video retailers' premises. Video retailers should display only videos or clips of videos that have been "approved for all audiences" by the Board. Provisions should also be made regarding the display of adult videos: they should be required to be kept in a separate section of the video store. Exemptions could be drafted to permit video retailers that deal solely with adult videos to show videos or clips from videos on their in-house screens that have not been "approved for all audiences". Such an exemption would require the video retailer to ensure that access to

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35 Videos are to be submitted even if the film version of the video has previously gone through the Board. Because the two versions may differ, each medium requires its own viewing and classification. This does not always happen in practice, and there are many older videos that have never been classified by the Board.

36 As of June 15, 1992. See *Cinema Act*, *supra*, note 32, s. 76.1, as en. by S.Q. 1991, c. 21, s. 12, and Regulation respecting stamps for films, O.C. 742-92 under the *Cinema Act*.

37 This system has a greater chance of being financially feasible if it can be instituted nationally, so that the "stickering" can be carried out at source. Earlier recommendations in this Report that call for a co-operative national arrangement and uniformity in classification categories will assist the effective operation of a sticker system.

38 *Theatres Act*, *supra*, note 4, s. 37.

39 Section 4 of the *Theatres Act*, *ibid.*, sets out the powers of the inspectors.

40 While this would be of no assistance for video rental machines in convenience stores or subway stations, these machines do have some built in protection in that they require a credit card for their operation. If a person under the age of eighteen has access to a credit card, it is likely with the consent of a parent.

its premises was restricted to persons eighteen years of age or older, and that this restriction is strictly enforced.[41]

The Board also approves all advertising matter in connection with film or the exhibition or distribution thereof.[42] The Commission endorses this practice. Further, the Commission recommends that restrictions routinely be placed on advertisements of pornographic or extremely violent materials. Controls on the time, place, and manner of advertising as well as its content should be stringently enforced.

The Board's use of information pieces to accompany classifications was also described in chapter 1 of this Report. Information pieces are designed to give as much data as possible to consumers of films and videos. Although information pieces are required to accompany classifications where they are ascribed to films,[43] a common complaint is that they are so small as to be of no use to the consumer. The Commission is of the view that information pieces are intended to perform a vital function of increasing consumer knowledge about films available for public viewing. Consequently, the Commission recommends that the use of information pieces be expanded and their size enlarged so as to allow them effectively to fulfil their stated, significant role. These pieces should be a regular accompaniment to classifications, and should convey as much information as is reasonably possible. As noted in chapter 3 of this Report, enhanced information pieces will also be useful to police and Crown attorneys in making their decisions about whether to lay charges and prosecute for violations of federal obscenity laws.

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41 In theory, non-adult-only video stores could have restricted access to certain rooms of their stores. Some people would argue that these retailers should be permitted to display material that has not been "approved for all audiences" in such sections of the store. However, the practical difficulties of keeping adult video material away from the eyes and ears of children who would be expected to be in a general video store would be very difficult to surmount. Further, the ambience of the general video store and the clientele attracted by the general video store differ from those of the adult store. Even if adult videos were shown in an access-controlled venue in the general video store, a burden would fall on the video store patrons to explain the "back room" to their children, and the ambience of the store would be altered. The distinction between permitted activities in the two types of stores is analogous to society's exercise of its prerogative to draw distinctions resulting in the physical separation of certain kinds of activities and pursuits (such as smelters or distribution warehouses) from others (such as parks or residential neighbourhoods).

42 *Theatres Act*, *supra*, note 4, s. 39. See, also, *ibid.*, s. 60(1)10, and regulation, *supra*, note 7, ss. 12 and 13.

43 *Classification System*, *supra*, note 9.

(b) The Power To Approve

As noted in chapter 1 of this Report, the Board's powers of "approval" are in fact powers of censorship. This section will look at the scope and current use of this power; based on this, as well as on the information previously discussed in this Report on, *inter alia*, pornography, causation, and other methods available to regulate pornography, the Commission will then draw its conclusion as to whether the Board should retain its powers of approval.

As noted in chapter 2 of this Report, the Board may base its approval decisions on criteria set out in the regulations. The Board's power of approval is set out in section 33 of the Act:[44]

> 33.—(1) Before the exhibition or distribution in Ontario of a film, an application for approval to exhibit or distribute and for classification of the film shall be made to the Board.
>
> (2) After viewing a film, the Board, in accordance with the criteria prescribed by the regulations, may refuse to approve the film for exhibition or distribution in Ontario.
>
> (3) The Board, having regard to the criteria prescribed by the regulations, may make an approval conditional upon the film being exhibited in designated locations and on specified dates only.

The specific criteria are set out in section 14 of the regulations,[45] which provides as follows:

> 14.—(1) In exercising its authority under sections 3 and 35 [now s. 33] of the Act, the Board shall consider the film in its entirety and take into account the general character and integrity of the film.
>
> (2) After viewing a film, the Board may refuse to approve a film for exhibition or distribution in Ontario where the film contains,
>
> (a) a graphic or prolonged scene of violence, torture, crime, cruelty, horror or human degradation;
>
> (b) the depiction of the physical abuse or humiliation of human beings for purposes of sexual gratification or as pleasing to the victim;
>
> (c) a scene where a person who is or is intended to represent a person under the age of sixteen years appears,

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[44] *Theatres Act*, *supra*, note 4.

[45] *Supra*, note 7.

(i) nude or partially nude in a sexually suggestive context, or

(ii) in a scene of explicit sexual activity.

(d) the explicit and gratuitous depiction of urination, defecation or vomiting;

(e) the explicit depiction of sexual activity;

(f) a scene depicting indignities to the human body in an explicit manner;

(g) a scene where there is undue emphasis on human genital organs; or

(h) a scene where an animal has been abused in the making of the film.

(3) In this section, "sexual activity" means acts, whether real or simulated, of intercourse or masturbation and includes the depiction of genital, anal or oral-genital connection between human beings or human beings and animals and anal or genital connection between human beings by means of objects.

At the end of every month, the Board publishes a "Classification List" that details the titles of all the films and videos it has reviewed that month, each film's country of origin and the name of the distributor, the classification and information pieces accorded to the film, and specifics of the film's format. The lists show that, currently, the Board screens many more videotapes than films; the "restricted" classification is given more often than other classifications; and there is a large proportion of videos that receive the information piece "Adult Sex Video".

If an elimination has been required, this is indicated on the list, and a description of the eliminations pertaining to each film is attached to the end of the list. For films that are simply not approved, details other than a title, country, distributor, the designation "N.A.", and format details are not provided. A perusal of recent lists shows that almost all of the eliminations required are from adult sex videos. Most eliminations required by the Board consist of scenes of ejaculation on someone's face, "double penetration", and penetration by foreign objects. Other eliminations include scenes of beating and humiliation, whipping or physical abuse for sexual gratification, bondage, and sexual torture. Footage that is to be eliminated is specified by reference to the minute of film at which it occurs.

Thus while the criteria under section 14 of the regulations, set out above, are rather broad, it is evident that the Board currently focuses on certain kinds of sexual depictions as appropriate objects for elimination. This

reflects the Board's evaluation of current community standards[46] and concerns of contemporary society.[47]

Based on the research on pornography and violence in society, academic commentary, and submissions received in the course of this study, the Commission is of the view that the concerns about certain kinds of material, contained in various media, that are sexually violent, degrading, and dehumanizing are serious and should be addressed. While the data on causation are inconclusive, the Commission has proceeded in this Report on the basis that the Legislature is entitled to presume some measure of causation when enacting legislation. This, however, does not resolve the task of the Commission. Rather, as pointed out earlier in this Report, the Commission's focus is on whether the censorship powers of the Board facilitate society's goal of combatting the problems that are associated with these materials. At this point it must be emphasized that a principal aim of those who are concerned with the problems associated with this kind of violent material is to *delegitimize* its presence in our society.[48] The disagreement is really about what will cause that delegitimization to occur.[49]

In the Commission's view, the ability of the Board's censorship powers to assist in achieving delegitimization of targeted images, a goal that the Commission unequivocally supports, is questionable at best. The expansion of technologies, initially visible by its result in the rapid proliferation of home adult sex videos, continues. Material that is currently available on videos is

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46 Memorandum of Understanding between the Minister of Consumer and Commercial Relations and the Ontario Film Review Board, III.3.(d).

47 Compare *supra*, ch. 2.

48 For example, delegitimization has occurred in relation to images of smoking, which were once but are no longer generally viewed as glamorous, and images of drinking and driving, which are no longer used as "comic relief": Toronto Women in Film and Television, presentation to the hearings of the Canadian Panel on Violence by B. Barde (Toronto, March 24, 1992), at 5 (hereinafter referred to as "TWIFT"). TWIFT uses the term "create a public revulsion" instead of "delegitimize"; both terms, however, support the same idea. Compare C.A. MacKinnon, "'More Than Simply a Magazine': Playboy's Money", in *Feminism Unmodified*[:] *Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987) 134, at 140; see *supra*, ch. 2, note 32 and accompanying text.

49 Compare the following statement in D. Atkinson and M. Gourdeau, *Summary and Analysis of Various Studies on Violence and Television* (Canadian Radio-television and Telecommunications Commission, June 1991), at 15: "This still leaves room for an assessment of television violence from an ethical perspective. Such an assessment is, however, only possible if the interests and values of all those who are concerned about the problem of violence, both the public and the industry, are considered. By debating the values involved, it will be possible to determine what is socially acceptable in terms of television violence and appropriate treatments of it. For this reason, debate should be encouraged. It is also appropriate that the debate be ongoing since values change over time. What was deemed acceptable thirty years ago, in the depiction on television of male/female relationships is not necessarily the same today. The same argument applies to violence".

now or will imminently be readily available in homes through such mechanisms as pay-per-view television, direct broadcast satellite, and computer networks.[50] The exemptions in the regulations covering films that have "previously been broadcast or transmitted in a manner capable of being received in the Province of Ontario by home receptors without the use of satellite dishes or electronic descramblers"[51] will therefore soon extend to more and more material. The Board will, through no fault of its own, become less and less able effectively to stop images from reaching those who seek them. The viability of a system that attempts to control what can and cannot be seen must be questioned in the face of this rapidly expanding technology. At the same time, inherent in the power of censorship are the potential for abuse[52] and the certainty of disagreement about how the power ought to be exercised. The decisions as to what material ought to be censored will become increasingly contested, as the criterion of harm can be used to capture innumerable images. Images abound in film, television, video, and print that many people consider objectionable and harmful in different ways; various societal groups are the targets of the messages these images convey. The aim of encouraging mass public rejection of these images must be achieved through positive action at all levels of society, and cannot be achieved by a government board that has the ability to censor.

The removal of the Board's censorship power will alter its role in the regulation of pornography. The Board's increased use of information pieces, recommended above, will allow it to operate more effectively than does its censorship power, and to counteract any potential negative impact engendered by the loss of the censorship power. That is, viewers will have as much information as possible about the contents of a film before viewing it, so that people need not be subjected to viewing scenes that may previously have been censored, as they will, in advance, be aware of the kind of material that the film contains. This change, in conjunction with the other modifications to the Board's role recommended in this Report, will enable the Board to become more effective in the regulation of targeted material.

Ultimately, in assessing legislation that confers the power of censorship, we must turn our minds to the question of whether such legislation can hope to be effective, or whether, by relying on censorship legislation, we are

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[50] See, for example, P. Moon, "Computers graphic when it comes to porn", *Globe and Mail*, Toronto (July 20, 1992) A1.

[51] Regulation, *supra*, note 7, s. 33(1). The exemptions are discussed in more detail below.

[52] It is impossible to delineate powers of this kind so precisely that there is no room left for the subjective exercise of discretion in their application, because, for example, depictions of sexual violence are sometimes necessary for educational purposes. Because it is impossible to eliminate the role of the subjective exercise of discretion, there is inherent in the power the potential for abuse. Thus, the use of powers that prohibit expression will always be contentious.

distracting ourselves from finding and promoting other methods for regulating pornography and dealing with the problems associated with it. The difficulty we face in a Report that focuses solely on the powers of the Film Review Board is that we may be led to an unsatisfying response. In concluding that censorship is an ineffective, inappropriate response, we are faced with two disturbing consequences. First, by removing the censorship powers of the Board, the mechanisms of criminal prosecution and customs prohibition will feel an increased burden, and perhaps an increased responsibility, to control these materials.[53] Yet these mechanisms may be both undesirable and ineffective procedures for regulating this material. The second concern is that we are unable, in the scope of this Report, to examine and assess all the alternatives for regulating pornographic materials. This Report, then, should be viewed as only part of a process of examining effective methods for dealing with the problems associated with pornography. The conclusion that censorship is both ineffective and inappropriate does not mean that other methods cannot be found and undertaken to redress the problems that censorship cannot effectively redress.

In fact, throughout this Report, the Commission has emphasized that the Film Review Board should be considered within the context of other existing or proposed mechanisms for regulating this kind of material. These mechanisms include the suggestions of many of the "feminists against regulation" set out above in the section of this Report dealing with pornography.[54] These suggestions encourage people to take an affirmative stand against this material and to take positive action to reduce the significance and weight accorded to this material as well as its prevalence in contemporary society.[55] Positive actions should be understood as including educational programmes to increase general media literacy and the use of re-sensitization techniques.[56] Additional methods that do not involve prior restraint or the use of the criminal law were also discussed in chapter 2 of

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53 See *supra*, ch. 2, sec. 4(a) and (c), and ch. 3, sec. 2(c), for discussions of the relationship between these mechanisms and the film boards of various provinces. Even in those provinces where there are no agreements between the police and the Board, the police and customs officials may feel even less reluctance to prosecute and prohibit where there is no Board with the power to censor.

54 See *supra*, ch. 2.

55 The group called Toronto Women in Film and Television has made several suggestions along this line: for example, there should be increased participation of women in key roles in the film and television industry. Further, the "industry has the capacity to develop and distribute 'redemptive images' which celebrate everyday human experiences of connection, of community, of diversity and difference, of human conflict without destruction of the other": TWIFT, *supra* note 48, at 6, 8.

56 See *supra*, ch. 2, notes 68-69 and accompanying text.

this Report. These other methods include the possible imposition of an excise tax and the use of zoning or other by-laws to control the time, place, and manner of display of certain materials.

Based on all of these factors and on the discussions of pornography, causation, censorship, and other methods of regulation contained in earlier chapters of this Report, the Commission therefore recommends that the Board no longer have the power to require eliminations or to disapprove or prohibit completely the exhibition of films and videos in Ontario. The criteria in section 14 of the regulations[57] should therefore be removed.

The Commission further recommends that the Board's name be changed to the Ontario Film Classification Board.

We began by asking whether parts of the *Theatres Act*,[58] while probably constitutionally valid, are wise pieces of legislation. We conclude that the Act is unwise in so far as it gives to the Board the power to censor or prohibit certain images from being viewed in films and on videotapes.

2. EXEMPTIONS FROM CLASSIFICATION AND APPROVAL

The regulations provide that the sections of the Act requiring classification and approval of films and advertising by the Board before a film can be exhibited do not apply to certain films.[59] The exemptions apply to any film that

> 28.—(1) ...taken as a whole,
>
> (a) is designed to provide information, education or instruction; or
>
> (b) is designed for the purpose of advertising, demonstrating or instructing in the use of a commercial or industrial product or products or services.

However, the regulations then go on to provide exceptions to the exceptions, so that

> (2) Subsection (1) does not apply to the exhibition of a film,
>
> (a) in a theatre; or

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[57] Regulation, *supra*, note 7.

[58] *Supra*, note 4.

[59] Regulation, *supra*, note 7, s. 28.

(b) in any other premises where there is an admission charge for the exhibition of the film alone or as part of a series of films or donations are requested either prior or subsequent to the exhibition.

The regulations go on to stipulate that section 28(1) shall not apply to films that contain certain depictions, which loosely parallel the depictions specified in section 14 of the regulations as images permitted to form the basis for a Board decision not to approve a film. Many artists refer to these as "self-censorship" provisions. The provision then sets out another exception,[60] bringing the film back within the section 28(1) exemption

> where the film is distributed to a hospital or medical practitioner for use in medical education or treatment or to a school for educational purposes or to a public library.

Other exemptions include any film that is an integral part of a concert or theatrical stage production;[61] any film that "provides a record of an event or occasion to a person participating in the event or occasion";[62] and "video games", unless they contain scenes such as those referred to in section 28(3).[63] Further, the exhibition of a film at a film festival or by a public art gallery at its own fixed premises, and the exhibition of a film in and under the sponsorship of a public library are exempt from the classification and approval procedures of the Board.[64] Those responsible for showing these films are then required to indicate by a prominent sign that persons under the age of eighteen are not permitted.

Finally, the regulations provide that

> 33.—(1) A film that has previously been broadcast or transmitted in a manner capable of being received in the Province of Ontario by home receptors without the use of satellite dishes or electronic descramblers is empt from sections 35 and 38 [now ss. 33 and 37] of the Act in the version so broadcast or transmitted.

However,

> (2) Subsection (1) does not apply to a film that has been approved and classified by the Board.

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60 *Ibid.*, s. 28(3).

61 *Ibid.*, s. 29(1). This exemption is then again qualified by the content of scenes such as those referred to in s. 28(3), *ibid.*, s. 29(2).

62 *Ibid.*, s. 30.

63 *Ibid.*, s. 31.

64 *Ibid.*, s. 32(1). This is so as long as persons apparently under eighteen are not present (s. 32(2)) and where the film has not already been refused approval or approved and classified by the Board (s. 32(3)).

The issue of exemptions becomes less contentious if viewed within the new context of a Board that does not have powers of censorship. The exemption is thus from classification only, as no films would be subject to censorship powers. Festivals, galleries, and libraries are exempt only if they accept restricted classifications and do not permit anyone under eighteen to enter the premises. If a lower classification is desired, individual films may be submitted to the Board. Thus, these exempted films are accorded the most restrictive classifications. The exemptions continue to be important for not-for-profit artist-run centres that produce films and videos, as they reduce hardships of expense and administration. The criteria that must be met for films and videos to be exempt should be clarified. In so doing, a balance must be struck between the desire of viewers to have information and the inappropriateness of the existing regime for certain non–profit groups and their productions. That is, the only possibly negative effect of these films not being subject to the classification process is that less information is available to viewers, owing to the absence of a precise classification or information piece that would have been accorded by the Board. However, information is not required in these instances to determine whether a parent wants a child to see a film, for all films are "restricted". In these limited circumstances adults can usually receive their own information, if desired, directly from the sponsoring gallery, library, or festival co-ordinating body. The Commission thus concludes that the policy of having exemptions does not cause a problem, particularly within a new system that classifies and does not censor films. Because the power of approval is removed, the "exemptions from the exemptions", referred to by some in the arts community as the "self-censorship provisions" listed in section 28(3) and applicable to sections 29 and 31 of the regulations[65] can and should be removed.

The Commission therefore recommends that the criteria listed in section 28(3) of the regulations and applicable to sections 29 and 31 of the regulations be removed.

3. CONCLUSIONS

The Commission is of the view that the classification function of the Board is extremely important, and that its information-providing services should be enhanced. Parents and adult viewers desire and should be entitled to as much information as possible about the contents of a film before viewing it. This can be achieved through instituting national uniform categories for classification, increasing the use of descriptive information pieces, instituting a sticker system for video cassettes, and rendering the

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[65] *Ibid.*

information contained in Summary Reports readily available to the public.[66] The uniform classification scheme will assist in the effective operation of the legislative scheme recommended in chapter 3 of this Report, that would permit the Ontario Board to adopt the classifications of other provincial film boards. Increased information should be accompanied by increased exposure to media literacy programmes, so that media including film, television, and videos can be viewed critically.

The approval powers of the Board, on the other hand, do not fulfil an important function. While there are valid and pressing concerns that arise from a proliferation of violent and sexually violent materials in our society, these cannot be combatted effectively or delegitimized by the operation of a film board that has the power to censor images or entire films. This function cannot keep pace with the rapidly expanding technology that renders these images increasingly accessible and available in homes through pay-per-view television, direct broadcast satellites, and computer networks. As well, this kind of limitation on expression carries with it the potential for abuse, as it must rely heavily on subjective decision making. Regulations cannot be drafted with sufficient detail to remove the role of discretion. Yet, as soon as discretion enters into the equation, the potential for abuse outweighs the benefit that might be gained from the existence of such a power. The benefit of suppression, if it exists at all, is negligible, as images are available through many avenues and the attempt to suppress them is bound to fail.

However, it is of vital importance to bear in mind that:

> [T]he rejection of censorship does not end all discussion of government policy toward pornography; indeed, the judgments and adjustments that political authorities will be responsible for in a nonsuppression setting will be both more subtle and more complicated than is the battle about censorship.
>
> The second point we would stress is the long-range importance of public attitudes in determining the role of pornography in modern Western countries. As long as censorship is regarded as a viable option, to oppose pornography is to endorse suppression. It is only when this blunt instrument of policy is unavailable that less drastic countermeasures can acquire a constituency.
>
> One reason we have little data on the impact of sustained attempts to stigmatize the use of sexist or violent pornography is that the traditional legal suppression of such materials occupied the field as an antipornography policy. Only recently has the legal availability of this material made public attitudes toward pornography of critical importance. We are thus in the early stages of

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[66] For a discussion of the Summary Reports, see *supra*, ch. 3, sec. 4(b), text corresponding to notes 208-213.

a social experiment with attitudes toward pornography in a number of Western democracies.[67]

As noted throughout this document, the scope of this Report is limited to an evaluation of the powers of the Ontario Film Review Board. It is not the function of this Report to solve the issue of how best to regulate pornography. One consequence of the scope of the Report is that the removal of the Board's censorship power, if it takes place within the existing framework of mechanisms that regulate sexually violent, degrading, or dehumanizing material, will likely result in an increased burden being shouldered by customs regulation and the criminal law, despite the fact that these may both be ineffective and undesirable alternatives. Because the focus of this Report is confined to a study of the powers of the Film Review Board, the Commission is not in a position here to evaluate all other proposed mechanisms. Based on its research in this document, the Commission would, however, tend to favour a move toward methods that do not rely on prior restraint or criminalization, but that support increased information, education, and controls on the time, place, and manner of displays of targeted materials. Educational programmes, such as media literacy courses,[68] as well as the fostering of messages that contain corrective information about sexuality and the effects of certain behaviours, should be pursued. Restrictions on the advertising of violent, sexually violent, and degrading materials should be instituted, in order to facilitate the delegitimization of the messages they convey. Other zoning or by-law restrictions on the time, place, and manner of display of these materials may be desirable, and the usefulness and feasibility of more radical methods, including the possible imposition of an excise tax on these materials, should be investigated. At the same time, controls on videotapes should be strengthened through the institution of a sticker system, and of legislative controls on the ages of persons to whom videos may be rented, loaned, or sold, according to the age restriction in the classification on the particular video. These should be accompanied by controls on what video retailers may display on in-house television screens. Other possibilities not mentioned in the Report, such as, for example, the institution of a subsidy programme for

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67 G. Hawkins and F.E. Zimring, *Pornography in a free society* (New York: Cambridge University Press, 1988), at 216-17.

68 Compare this conclusion in A. Martinez, *Scientific Knowledge about Television Violence* (Canadian Radio–television and Telecommunications Commission), at 47: "One thing is certain: the effects of television violence can be controlled in pre-adolescent children by certain factual interventions involving social cognition. A strategy of media literacy, implemented by the various agents responsible for socializing children—particulary parents, schools and the broadcasting industry—would be a first step in this direction.... two rules should be kept in mind: on one hand, to avoid shocking the sensibilities of young viewers and, on the other hand, to increase their knowledge of the medium. This is akin to the conclusions of [other researchers], who believe that the decoding of violent content provides us with a way of distancing ourselves from it" (References omitted).

certain kinds of films seen to be desirable, should be examined. The focus should shift away from a debate about censorship, and the unacceptability of harmful messages should be conveyed by means other than forcible attempts to prevent the images from being portrayed.

Responsibility for combatting the images and their apprehended harms must be shouldered by a broad segment of society and cannot be left to a government-appointed board that has the authority to censor images or entire films. It is our view that that solution is a simplistic and ineffective attempt to deal with the myriad of complex issues and problems that this material raises.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

1. The *Theatres Act* should be amended to allow the Ontario Film Review Board to adopt the classifications granted to films by other boards in remaining provincial jurisdictions. The Ontario Board should retain ultimate authority to accept or reject the classifications of other boards. This control ensures that local accountability will be maintained. (Ch. 3, at 78)

2. The information contained in the Summary Reports should be made readily available to members of the public by, for example, being kept in public libraries, or by other means such as the use of an automated telephone information system. (Ch. 3, at 107)

3. Ontario should work with the other provinces to develop, by agreement, one uniform set of classification categories with guidelines. It is the Commission's view that, in developing classification categories, boards and legislators are entitled to rely on the proposition that information will lead to the careful exercise of parental or other adult discretion. (Ch. 4, at 117)

4. A sticker system, such as that now in use in Quebec, should be instituted so that the classification accorded to each videofilm is clearly displayed on the video box and on the video cassette itself. Illegal videos, that have not gone through the Ontario Film Review Board even though they are required to do so by legislation, will then be readily identifiable to both inspectors under the Act, and to consumers. (Ch. 4, at 119)

5. The *Theatres Act* should be amended to incorporate provisions that prohibit videos from being rented, sold, or loaned to any person of an age excluded by the classification accorded to that video. (Ch. 4, at 119)

6. Legislative provisions should be adopted regarding the practice of showing videos or clips from videos on in-house television screens on video retailers' premises. Video retailers should display only videos or clips of videos that have been "approved for all audiences" by the Board. (Ch. 4, at 119)

7. Restrictions should routinely be placed on advertisements of pornographic or extremely violent materials. Controls on the time, place, and manner of advertising as well as its content should be stringently enforced. (Ch. 4, at 120)

8. The use of information pieces should be expanded and their size enlarged so as to allow them effectively to fulfil their stated, significant role. These pieces should be a regular accompaniment to classifications, and should convey as much information as is reasonably possible. (Ch. 4, at 120)

9. The Board should no longer have the power to require eliminations or to disapprove or prohibit completely the exhibition of films and videos in Ontario. The criteria in section 14 of the regulations should therefore be removed. (Ch. 4, at 126)

10. The Board's name should be changed to the Ontario Film Classification Board. (Ch. 4, at 126)

11. The criteria listed in section 28(3) of the regulations and applicable to sections 29 and 31 of the regulations should be removed. (Ch. 4, at 128)

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